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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 86

OPAL SAXTON DAVIS, PETITIONER,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED MAY 4, 1942.

CERTIORARI GRANTED MAY 25, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.

OPAL SAXTON DAVIS, PETITIONER,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX.

	Original	Print
Proceedings before Department of Labor and Industries	1	1
Claim for pension	1	1
Order of Supervisor rejecting claim	2	3
Order of Joint Board sustaining supervisor	3	4
Record from Superior Court of King County	4	5
Notice of appeal to Superior Court	4	5
Findings of fact and conclusions of law	5	6
Judgment of dismissal	13	11
Notice of appeal to Supreme Court	15	12
Proceedings in Supreme Court of Washington	16	13
Opinion, Blake, J.	16	13
Order denying petition for rehearing	21	16
Judgment	22	16
Praecipe for transcript of record	23	17
Clerk's certificate (omitted in printing)	24	
Order to transmit original exhibits	25	18
Plaintiff's Exhibit 5—Photograph	26	18
Plaintiff's Exhibit 6—Photograph	27	18
Clerk's certificate (omitted in printing)	28	
Order allowing certiorari		19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 27, 1942.

[fol. 1]

STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES, INDUSTRIAL INSURANCE DIVISION

Claim for Pension by Widow or Children

Statutory Provisions;

1. Cash payment to widow when proofs are in: $250.00.
2. Pension to widow: $35.00 per month, which ceases upon remarriage with $240.00 payment.
3. To widow for children to age 16: $12.50 per month for youngest or only child; $7.50 for next youngest; $5.00 for each additional child. Guardian not required when widow living and children under her care.
4. To orphan children: $25.00 per month each, maximum for all $75.00 a month, which will be paid through legal guardian.
5. Burial allowance: $150.00 where there is a widow or orphan child, will be paid to undertaker only where he makes affidavit that no part of the burial expenses have been either directly paid by or charged to the widow or orphan child. $100.00 allowed for unmarried man.
6. Invalid widower of deceased workman rated same as widow.

Claim:

1. The deceased workman: Name Ancil Evan Davis.
Date of birth June 9, 1901. Place of birth Minn. (Martin Co.)
Date of marriage May 29, 1938. Place Wenatchee, Wn.
Employer when injured Manson Construction Co.
Date of injury June 8, 1940. Date of Death June 8, 1940.
Cause of death Accidental drowning.
Physician at time of death —— ——.
Undertaker Forkner's University Parlors. Address 4214 Univ. Way.

2. The widow: (own given name in full) Opal Saxton Davis.
Date of birth: Month Apr. 27, 1900. Day 27. Year 1900.
Address: House No. —. Street ——.
Town Johnsonville, County Wayne, State Ill.
If divorced from deceased give date ——.

If separated give date of separation ——.
Cause of separation——.
If remarried since death of workman give date of remarriage: ——.

3. Children of deceased (Child includes posthumous child, step-child, one legally adopted prior to the injury, and an illegitimate child legitimated prior to the injury):
Name: Donna Laurene.
Date of birth: Nov. 10, 1938.
Sex: Female.

4. Guardian: Full name ——. Age —.
Address: House No. ——. Street ——.
Town ——. County ——. State ——.
Date of appointment ——.

5. Documents to be attached:
(a) Widow will attach marriage certificate, which will be returned after inspection. O. K. Ret. 9/3/40—WR. (s.)
(b) Guardian will attach certified copy of letters of guardianship.

☞Widow to Also Answer Following Questions☜

Place of birth Johnsonville, Ill. Are you a citizen of the U. S.? Yes.

6. Other instructions:

Upon receipt of this claim the department, if it has not already done so, will write for and procure the employer's report, report from last physician or coroner, and undertaker, and other proofs that may be required, whereupon claim will be decided.

Claimants who are aliens, not residing in the United States will observe requirements on letter of instructions to be attached hereto.

Dated this 16 day of July, 1940.

Sign Here Opal Saxton Davis (s), Widow or Guardian

State of Wash.,
County of King, ss:

On this 16 day of July, A. D. 1940, personally appeared before me the above named Opal Saxton Davis, and made oath that the answers by him or her above made are true,

and that he or she has concealed no fact from the Industrial Insurance Division.

(s.) Thos. P. Carlon, Notary Public or Justice of the Peace. (Seal.) Notarized.

(Unless officer taking acknowledgment has official seal, certificate of appointment will be required.)

Rec'd Jul. 20, 1940.

[fol. 2] [Stamp:] Mailed Sep. 3, 1940. Department of Labor & Industries, Olympia. (s.) W. R.

In and Before the Supervisor of Industrial Insurance Department of Labor and Industries, State of Washington

Manson Construction Company, Seattle, Washington.

Claimant

Opal Saxton Davis, 5227-37th Ave. N. E., Seattle, Washington.

ORDER AND NOTICE

Claim No. 968217. Firm No. —. Class ——. Date Injured July 8, 1940.

On this date, the complete record of the above claim being presented to the Supervisor of Industrial Insurance, and he having carefully and thoroughly considered all matters contained therein, and you being hereby notified, now:

It Is Hereby Ordered that

Whereas, Opal Saxton Davis, widow of Ancil Evan Davis, deceased, filed a claim for pension with this Department alleging that the accidental drowning of deceased on July 8, 1940 was due to an industrial injury coming within the scope of the workmen's compensation act, and

Whereas, after thorough investigation it has been determined that the work which the claimant was doing at the time of the said fatal accident does not come under the jurisdiction of the workmen's compensation act but is maritime in character.

It Is Therefore Hereby Ordered that the aforesaid claim be rejected for the following reason: That the alleged injury

was sustained on board a vessel in navigable waters and was therefore under Admiralty jurisdiction.

JMT:EB

Branch Office. Jay Olinger, Supervisor of Industrial Insurance, by (s.) J. M. Tiernan, Claim Agent.

Dated August 29, 1940 at Olympia, Washington.

University Funeral Parlors 4214 University Way, Seattle, Washington.

(These findings and decision hereon are official and effective when and only when signed by the personal or facsimile signature of the Supervisor of Industrial Insurance and the personal signature of the claim agent or other person duly authorized.)

On the date stamped on the reverse side hereof, the original, of which this is a copy, was deposited in the United States mail with postage prepaid and addressed to the claimant and/or other interested parties to their respective addresses as indicated on the reverse side hereof, by the person whose initials appear on said stamp.

[fol. 3] [Stamp:] Joint Board. Mailed Feb. 21, 1941. By (s.) M. V. S.

In and Before the Department of Labor and Industries, State of Washington, Joint Board

Dated February 17, 1941, at Olympia, Washington.

Mrs. Opal Saxton Davis, 5227-37th Ave. N. E., Seattle, Washington.

Claimant Ansel E. Davis, Dec'd.

ORDER AND NOTICE

Copy

Claim No. 968217. Firm No. —. Class —. Date Injured 7-8-40.

On this date, the complete record of the above claim being presented to the Joint Board in Executive Session and the Joint Board having carefully and thoroughly considered

such record together with all evidence offered in the matter, and you being hereby notified, now:

It Is Hereby Ordered That the supervisor's action be and hereby is sustained.

cc to: McMicken, Rupp & Schweppe, 657-671 Colman Bldg., Seattle, Washington.

cc to: Manson Construction Co., % J. E. Sullivan, Contractor's Service, 1006 Securities Bldg., Seattle, Washington.

Joint Board, J. W. Hoover, Director. Jay Olinger, Supervisor of Industrial Insurance. Ed Sorger, Supervisor of Safety and Industrial Relations. (s.) E. E. Stark, Secretary.

EES:MVS.

[fol. 4] In Superior Court of the State of Washington for King County

No. 325557

Opal Saxton Davis, Plaintiff,

vs.

Department of Labor and Industries of the State of Washington, Defendant

Notice of Appeal—Filed February 25, 1941

To the Department of Labor and Industries of the State of Washington; and to the Director Thereof:

You and Each of You Will Please Take Notice that the above-named plaintiff and appellant, Opal Saxton Davis, hereby appeals to the Superior Court of the State of Washington, for King County (the county of her residence) from that certain order of the Joint Board of the Department of Labor and Industries dated February 17, 1941, and mailed February 21, 1941, sustaining the action of the Supervisor of Industrial Insurance in rejecting the plaintiff's claim.

Dated this 25th day of February, 1941.

McMicken, Rupp & Schweppe, Attorneys for Plaintiff and appellant.

Office and Post Office Address: 657 Colman Building, Seattle, King County, Washington.

[File endorsement omitted.]

[fol. 5] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

Findings of Fact and Conclusions of Law—Filed May 19, 1941

This matter coming on to be heard this 7th day of May, 1941, before the Honorable Hugh C. Todd, one of the judges of the above-entitled court, and the plaintiff, Mrs. Opal Saxton Davis, being represented by her attorneys, McMicken, Rupp & Schweppe, Maurice R. McMicken appearing in the matter, and the defendant, Department of Labor and Industries of the State of Washington, being represented by Smith Troy, Attorney General, and Edward S. Franklin, Assistant Attorney General, and the Court having considered the departmental claim file and the exhibits in the proceedings, and having listened to to the arguments of counsel and being fully advised in the premises, now enters herein its following

FINDINGS OF FACT

I

That Ancil Evan Davis met his death by accidental drowning in the Snohomish River, a navigable body of water connecting with Puget Sound, near Everett, Washington, on July 8, 1940, during the course of his employment while employed as a structural iron worker by the Manson Construction & Engineering Company, a corporation, of [fol. 6] Seattle, Washington, leaving surviving him the plaintiff, Opal Saxton Davis, and a minor child, Donna Laurene Davis; that the Manson Construction & Engineering Company is a contributor to the Workmen's Compensation Fund of the State of Washington.

II

That the Manson Construction & Engineering Company had a contract with the Washington State Highway Department (No. 2524) to build a portion of the new Snohomish River bridge spanning the Snohomish River at Everett, Washington, and, upon its completion, also to dismantle the old drawbridge and remove its draw-rest and piers which the new bridge was intended to supplant, both structures being about 800 feet apart.

III

That the new bridge was placed in operation on June 22, 1940, and on the same date traffic was shut off on the old drawbridge and shortly thereafter the Manson Construction & Engineering Company proceeded to dismantle the old drawbridge.

IV

That under its contract with the State Highway Department, the Manson Construction & Engineering Company was required to stock-pile the steel removed from the old drawbridge, at a place designated as the steel storage site, on the north bank of the Snohomish River, about 250 feet to the north of the draw-rest, or center pier of the drawbridge, which said storage site had been leased by the Washington State Highway Department for that purpose.

V

That the original contract provided for dismantling the [fol. 7] old structural steel of the drawbridge, with a view to its reuse in the future, but an examination of its quality indicated that it was in such poor condition it had only a scrap value, so the contract was modified, allowing the Manson Construction & Engineering Company to dismantle the steel by cutting it with oxy-acetylene torches, and the steel was ultimately sold as junk by the Washington State Highway Department to the Riverside Junk Company of Everett, Washington.

VI

That in furtherance of its contract of dismantling the old drawbridge and depositing the scrap steel on the steel storage site, on July 2, 1940, the Manson Construction & Engineering Company leased a licensed and registered barge from the Puget Sound Tug & Barge Company, at Everett, and towed the same with its own tug from the waterfront at Everett up the Snohomish River to a point under the central portion of the old Snohomish River drawbridge; that said barge was fastened alongside of a derrick barge belonging to the Manson Construction & Engineering Company, upon which was situated a derrick which was to be used in lowering the steel from the drawbridge on to the barge, and later to remove the steel from the barge to the

storage site on shore; that the derrick barge was made fast to the north side of the draw-rest, or center pier of the drawbridge, and at the down-stream or easterly portion of said pier, the up-stream end of the derrick barge being located approximately opposite the down-stream or easterly side of the old drawbridge; that the rented barge, the der- [fol. 8] rick barge and the tug owned by the Manson Construction & Engineering Company were vessels which were licensed and registered with the United States Department of Commerce, Bureau of Navigation.

VII

That the method of loading and unloading the steel removed from the old drawbridge was as follows: The Manson Construction & Engineering Company employed structural iron workers stationed on the span of the old drawbridge, to cut the steel beams with oxy-acetylene torches into appropriate lengths for handling; that cables from the derrick on the derrick barge were attached to each beam before it was cut off, and when the steel beam was completely severed, the boom of the derrick was swung around over the rented barge and the steel lowered on to the said barge as a temporary storage space until the barge was taken to the shore and the steel unloaded therefrom and stock-piled on the storage site; that when the rented barge was loaded with the severed steel beams, the said barge and the derrick barge were moved over to the river bank alongside of the storage site, which required their movement over the navigable waters of the Snohomish River, a distance of approximately 200 feet; that said movement was accomplished either by being towed to the north shore of the river by the tug belonging to the Manson Construction & Engineering Company, or, if the current was too strong, by putting cables ashore and hauling in on said cables, or by both methods jointly; the steel was then hoisted from the rented barge by means of the derrick boom, which then swung around and deposited the steel on the storage site; that at the time of the death of the deceased, the barge on which the steel was being loaded had not been completely loaded and none of the steel had at that time been unloaded and stock-piled on the steel storage site.

[fol. 9] VIII

That on July 2, 1940, the deceased was hired by the Manson Construction & Engineering Company as a structural iron worker in connection with its operations in dismantling the Snohomish River drawbridge, and continued in such employ until his death by drowning on July 8, 1940; that on the date of his death his duties were to work on the barge on which the steel was being lowered, to watch the shape of the steel being lowered to the barge, to decide where it should be placed, and to burn off with oxy-acetylene torches any short stubs of iron hanging to it that would interfere with its being properly piled.

IX

That decedent, at about 9:30 a. m. on July 8, 1940, was last seen standing on the bull-rail on the north side of the barge on which the steel was being loaded, about 30 feet from the up-stream or westerly end of said barge; that at that time he had discussed with his foreman, Dewey R. Thibeau, the best place to place on the barge a large five-ton beam that was about to be cut loose by the workmen on the draw-span; that the foreman at that time was standing on the derrick barge, just to the west or up-stream of the steam engine of the derrick; that they agreed as to where said beam was to be placed on the rented barge, and the foreman then turned to watch the final cut on the beam; that when the beam had been cut and the derrick boom started to turn it toward the barge, the foreman noticed that the decedent was missing, although only two or three minutes had elapsed since the foreman last talked with decedent; that a ladder, which had been lying on the bull-rail near where decedent [fol. 10] was last seen alive, was noticed floating in the river about 200 feet down-stream from the barge; that some of the workmen went down the river in a row boat and picked up the ladder and found floating near it decedent's gloves; that decedent's body was recovered from the river about 1:30 p. m. on July 8, 1940, at approximately a quarter of a mile down-stream from the old drawbridge.

X

That the foreman Thibeau testified that after the steel was loaded on the barge, the deceased, if he had lived,

would have accompanied the barge to the site of unloading and there assisted in the unloading of the same; but whether the unloading of the steel would have required the presence of the deceased, if he had lived, to remain on the barge or to be stationed on the shore to assist in such unloading cannot be determined, since the deceased was drowned before the barge had been completely loaded for the first time so that none of the steel had been unloaded on shore.

XI

That following the death of her husband, the plaintiff filed a claim for compensation under the Workmen's Compensation Act of the State of Washington with the Department of Labor and Industries, which claim was rejected by the Supervisor of Industrial Insurance on August 29, 1940, upon the grounds that the injury to the plaintiff's husband was sustained on board a vessel in navigable waters, and was therefore under the exclusive jurisdiction of admiralty; that the plaintiff thereupon duly and regularly appealed to the Joint Board of the Department of Labor and Industries from the order rejecting her claim, and hearings were held which culminated with the Joint [fol. 11] Board, on February 17, 1941, entering an order sustaining the rejection of the plaintiff's claim for compensation upon the grounds that, since the death of the plaintiff's husband occurred on navigable waters while in the act of loading a barge, which was then to be towed over navigable waters where it was to be unloaded, the employment of the deceased husband of the plaintiff was subject to admiralty jurisdiction, and the Workmen's Compensation Act of the State of Washington could not apply to the same, in view of the case of *Comar v. Department of Labor and Industries*, 187 Wash. 99, and other decisions of the Supreme Court, from which order of the Joint Board the plaintiff appealed to this court.

Todd, J.

From the foregoing Findings of Fact, the Court enters herein the following

Conclusions of Law

I

That the deceased husband of the plaintiff, at the time of his death, was engaged in the performance of a maritime

service on a licensed vessel while lying in the navigable waters of the United States; that the employment and duties and locality of the deceased at the time of his death were not matters of purely local concern to which the Workmen's Compensation Act of the State of Washington is applicable, but were directly related to commerce and navigation; and that the plaintiff's rights to recover for the death of her husband are governed exclusively by the law and rules of admiralty jurisdiction.

[fol. 12] II

That the order of the Joint Board of the Department of Labor and Industries dated February 17, 1941, rejecting the claim filed by the plaintiff under the Workmen's Compensation Act be and the same is hereby approved, and her appeal herein is hereby dismissed.

Done in open court this 19th day of May, 1941.

Hugh Todd, Judge.

O. K. as to form. McMicken, Rupp & Schweppe.
O. K. Smith Troy, Attorney General; Edw. S. Franklin, Assistant Attorney General.

[File endorsement omitted.]

[fol. 13] In Superior Court of King County

No. 325557

Opal Saxton Davis, Plaintiff,

vs.

Department of Labor and Industries of the State of Washington, Defendant

Judgment of Dismissal—Filed May 19, 1941

This matter coming on to be heard on the 7th day of May, 1941, before the Honorable Hugh C. Todd, one of the judges of the above entitled court, and the plaintiff being represented by her attorneys, McMicken, Rupp and Schweppe, Maurice R. McMicken appearing in the matter, and the de-

fendant being represented by Smith Troy, Attorney General, and Edward S. Franklin, Assistant Attorney General, and the court having listened to the arguments of counsel and having duly considered the matter and having entered herein its Findings and Fact and Conclusions of Law:

It is therefore hereby ordered, adjudged, and decreed that the order of the Joint Board of the Department of Labor and Industries of the State of Washington dated February 17, 1941, rejecting the claim filed by the plaintiff under the Workmen's Compensation Act be and the same is hereby approved, and her appeal herein be and the same is hereby dismissed.

It is further ordered, adjudged, and decreed that the defendant do have and recover from the plaintiff its taxable costs herein.

Done in open court this 19th day of May, 1941.

Hugh Todd, Judge.

Receipt of copy of the foregoing Judgment of Dismissal acknowledged this 9th day of May, 1941, & OK'd as to form.

McMicken, Rupp & Schweppe, Attorney for Plaintiff.

[fol. 14] Judgment Number 169799. Entered in Execution Docket, Vol. 150, Page 184.

[File endorsement omitted.]

[fol. 15] In Superior Court of King County

[Title omitted]

Notice of Appeal—May 19, 1941

Findings, Conclusions & Judgment Signed—Exceptions

Plaintiff in open Court gave oral notice of an appeal from the Judgment of the Court and all parts therefrom to the Supreme Court of the State of Washington.

[File endorsement omitted.]

[fol. 16] IN SUPREME COURT OF WASHINGTON

No. 28464. Department Two

OPAL SAXTON DAVIS, Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent

OPINION—Filed January 30, 1942

The plaintiff is the widow of Ancil Evan Davis, who was drowned in the Snohomish river while engaged in extra-hazardous employment. Plaintiff filed her claim for pension under the industrial insurance act. The claim was rejected by the supervisor of industrial insurance. His rejection of the claim was sustained by the joint board of the department of labor and industries. On appeal to the superior court, judgment was entered approving the order of the joint board and dismissing the appeal. From that judgment, the appeal to this court is taken.

The facts out of which the claim arose are not in dispute. Briefly summarized from the court's findings, they are as follows: Manson Construction & Engineering Company, which was a contributor to the accident fund under the industrial insurance act, had a contract with the state highway department to build a portion of the concrete [fol. 17] bridge which now spans the Snohomish river at Everett. The company also agreed to dismantle the old drawbridge and stock-pile the material therefrom on the river bank at a point about 250 feet from the bridge site. This work was commenced about the first of July, 1940. In carrying out the work, a tug, a derrick barge, and a barge were used. All three were licensed vessels. The derrick barge was towed to the drawrest of the bridge and there moored. The barge was towed alongside the derrick barge and tied to it. The steel of the bridge was cut with oxy-acetylene torches into lengths for convenient handling and storing and then lowered by the derrick on to the barge.

Davis was employed by the company on July 2, 1940, as a structural steel worker. On July 8th, the day he met his death, he was working on the barge onto which the steel was being lowered, his duties being to decide where the steel should be placed and to burn off any short stubs

of iron that might interfere with its being properly piled. About nine-thirty in the morning, he discussed with the foreman the best location on the barge to place a five-ton beam that was about to be lowered. He was standing on or near the bull-rail of the barge at the time. That was the last seen of him. About one-thirty of the same afternoon, his body was recovered about a quarter of a mile downstream.

Appellant's claim for pension was rejected on the ground that Davis was, at the time of his accident, engaged in the performance of a maritime service upon navigable waters, the theory being that the state has no jurisdiction over such accidents, and that they are not within the purview of the industrial insurance act. State v. Dawson & Co., 122 Wash. 572, 211 Pac. 724, 212 Pac. 1059; affirmed, 264 U. S. [fol. 18] 219. That he was so engaged is hardly debatable. Notwithstanding, appellant contends that, at the time of his death, her husband was engaged in an operation of purely local concern—the dismantling of a bridge pursuant to the terms of a contract between the state of Washington and his employer, Manson Construction & Engineering Company.

The supreme court of the United States has held in several cases that benefits under state compensation acts may be claimed for accidents occurring on the navigable waters of the United States when they happen in the course of a purely local operation unconnected with commerce and navigation. *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469; *Millers' Underwriters* v. *Braud*, 270 U. S. 59; *State Industrial Board* v. *Terry & Tench Co.*, 273 U. S. 639; *Alaska Packers Ass'n* v. *Industrial Accident Comm.*, 276 U. S. 467.

This court has applied the principle in the following cases: *Eclipse Mill Co.* v. *Department of Labor & Industries* and *Sultan Ry. & Timber Co.* v. *Department of Labor & Industries*, 141 Wash. 172, 251 Pac. 130; *Dewey Fish Co.* v. *Department of Labor & Industries*, 181 Wash. 95, 41 P. (2d) 1099. The first two of the decisions just cited were affirmed by the supreme court of the United States. *Sultan Ry. & Timber Co.* v. *Department of Labor & Industries*, 277 U. S. 135.

In none of the cases cited, however, do the facts bear any analogy to the facts in the case at bar. Indeed, the facts in all the cases thus far cited are so dissimilar as to

render the decisions inapposite as authority—particularly in light of another line of decisions of the supreme court [fol. 19] of the United States. That court has uniformly held that the "loading and stowing of a ship's cargo" in navigable waters is a "maritime service," and that claims for injury incident thereto are exclusively within admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128; *Liability Assurance Co.* v. *Cook*, 281 U. S. 233. In the *Jensen* case, p. 217, the court said:

"The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction."

And again in the *Cook* case, p. 236:

"Whether Cook's employment contemplated that he should work regularly in unloading vessels or only when specially directed so to do is not important. The unloading of a ship is not matter of purely local concern as we have often pointed out. Under the circumstances disclosed the State lacked power to prescribe the rights and liabilities of the parties growing out of the accident."

In *Comar* v. *Department of Labor & Industries*, 187 Wash. 99, 59 P. (2d) 1113, this court accepted and applied the doctrine of those cases, denying the claim of a workman who was injured on a barge in navigable waters while engaged in unloading cargo. There is no essential difference [fol. 20] in the facts in that case and this. There, the transportation of the cargo was measured in miles, while here, it is measured in yards. But that is not a controlling factor. The accident occurred while Davis was working as a stevedore on a vessel in navigable waters loading cargo. The fact that he may have been employed as a structural steel worker is immaterial. *Liability Assurance Co.* v. *Cook*, *supra*. The loading of the steel on the barge was an integral part of the operation of dismantling the bridge. Under the decision of this court in the *Comar* case and the authorities there relied upon, this is the controlling factor—

calling for the application of the principle laid down in those cases.

Appellant lays great stress on the case of *Dessen* v. *Department of Labor & Industries*, 190 Wash. 69, 66 P. (2d) 867, asserting that the holding there is inconsistent with the holding in the *Comar* case. The accident in that case occurred on navigable waters, but the question of maritime jurisdiction was not raised nor discussed, much less decided. The case has no authoritative value upon the question now raised. *Petley* v. *Tacoma*, 127 Wash. 459, 221 Pac. 579.

Judgment affirmed.

Blake, J.

We concur:

Robinson, C. J., Beals, J., Simpson, J., Jeffers, J.

[File endorsement omitted.]

[fol. 21] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed Feb. 16, 1942

The court having considered appellant's petition for a rehearing herein;

It is Ordered that the petition be and it hereby is denied.

Dated this 9th day of February, 1942.

By the Court:

John S. Robinson, Chief Justice.

[File endorsement omitted.]

[fol. 22] IN SUPREME COURT OF WASHINGTON

No. 28464

King County No. 325557

OPAL SAXTON DAVIS, Appellant,

vs.

DEPARTMENT OF LABOR and INDUSTRIES OF THE STATE OF WASHINGTON, Respondent

JUDGMENT—February 16, 1942

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court

of King County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 16 day of February, A. D. 1942, on motion of Smith Troy, Esquire, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said Department of Labor and Industries have and recover of and from the said Opal Saxton Davis, and from United Pacific Insurance Company, surety, the costs of this action taxed and allowed at Twenty-seven and no/100 ($27.00) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of record in Volume 35 at page 555 of the Records and Files of the Supreme Court of the State of Washington.

[fol. 23] IN SUPREME COURT OF WASHINGTON

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed March 31, 1942

Hon. Benj. T. Hart, Clerk:

Please prepare transcript of record for Writ of Certiorari containing the following, and transmit the same to the Clerk of the Supreme Court of the United States:

1. Opal Saxton Davis' claim for Pension.
2. Denial of Claim by Supervisor.
3. Order sustaining Supervisor.
4. Notice of Appeal from Joint Board.
5. Findings of Fact and Conclusions of Law.
6. Judgment of Dismissal.
7. Journal Entry—Oral Notice of Appeal.
8. Opinion of Supreme Court.
9. Order Denying Petition for Rehearing.
10. Judgment of Supreme Court.
11. This Praecipe.

Please forward also Plaintiff's Original Exhibits 5 and 6 (photographs).

McMicken, Rupp & Schweppe, Attorneys for Appellant.

Stipulation

It is hereby stipulated that the above contains all matters essential to a consideration of the questions to be presented by the petition for Writ of Certiorari and for review on writ of certiorari if the petition is granted and that in printing the record all captions may be omitted.

Dated March 31, 1942.

McMicken, Rupp & Schweppe, Attorneys for Appellant. Smith Troy, Attorney General of the State of Washington; Edward S. Franklin, Assistant Attorney General.

[File endorsement omitted.]

[fol. 24] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 25] In Supreme Court of Washington

[Title omitted]

Order to Transmit Original Exhibits—Filed April 1, 1942

It is hereby Ordered that the Clerk of this Court may transmit original Exhibits Nos. 5 and 6 of the above cause to the Clerk of the Supreme Court of the United States as part of the record for Writ of Certiorari, the same to be finally returned to this Court.

Dated this 31st day of March, 1942.

John S. Robinson, Chief Justice.

OK. McMicken, Rupp & Schweppe. Smith Troy, Attorney General; Edw. S. Franklin, Asst.

[File endorsement omitted.]

(Here follow 2 photolithographs, side folios 26-27)

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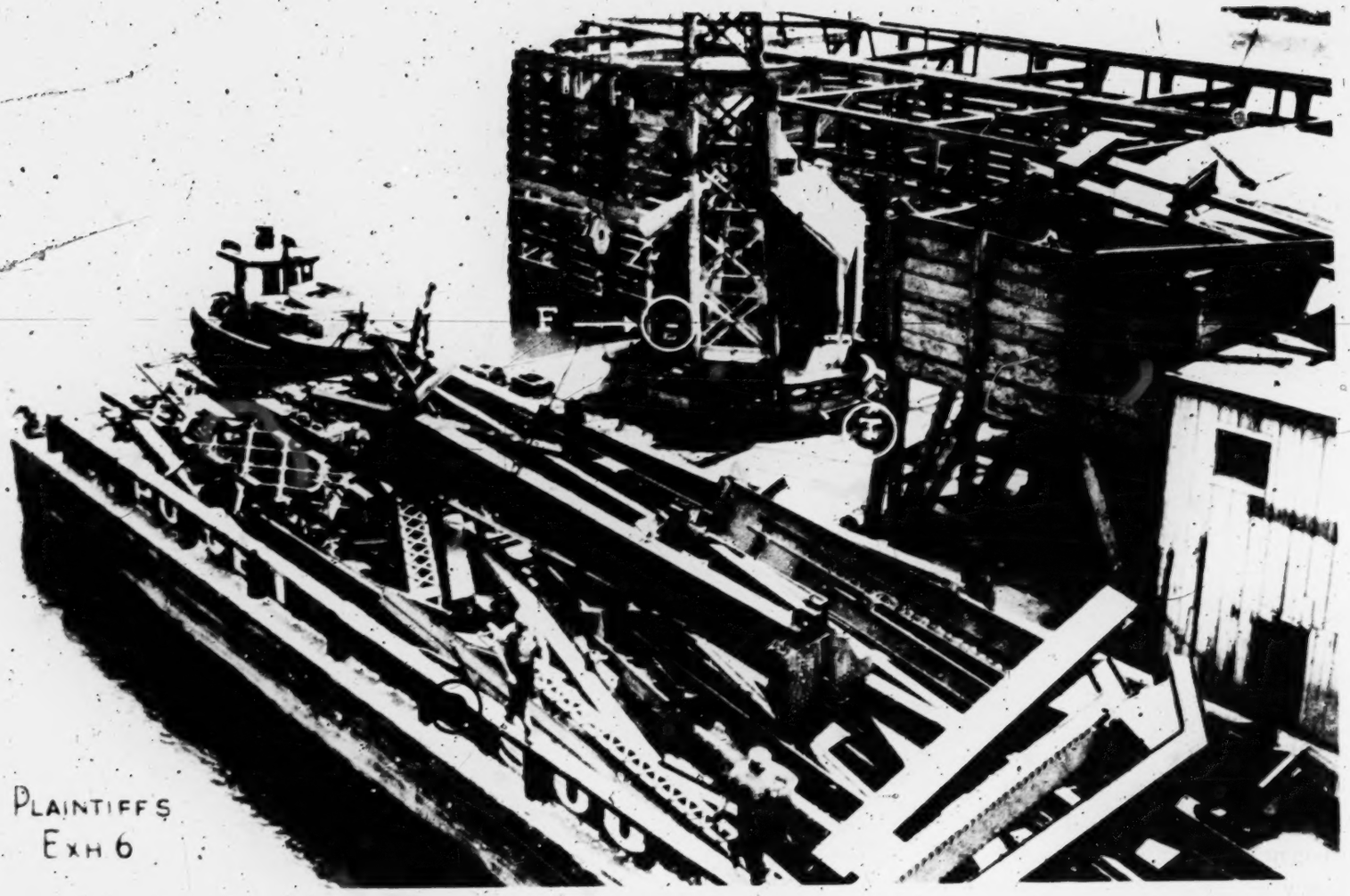

PLAINTIFFS
EXH 6

[fol. 28] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 29] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 25, 1942

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
Office - Supreme Court, U. S.
FILED
MAY 4 1942
CHARLES ELMORE CROPLEY
CLERK

No. 1211

Supreme Court of the United States

OCTOBER TERM, 1941

OPAL SAXTON DAVIS, *Petitioner,*

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON, AND BRIEF IN SUPPORT THEREOF

MAURICE R. McMICKEN,
OTTO B. RUPP,
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THE ARGUS PRESS, SEATTLE

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SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1
Summary Statement of the Matter Involved	1
Jurisdictional Statement	7
Question Presented	9
Reasons relied on for allowance of the Writ	11
Brief in Support of Petition for Writ of Certiorari	13
I Opinion of Court Below	13
II Jurisdiction	13
III Statement of the Case	14
IV Specification of Error	14
V Argument	14

TABLE OF CASES CITED

Alaska Packers Ass'n. v. Industrial Acc. Comm. 276 U. S. 467	9, 11
Alaska Packers Ass'n. v. Marshall, 95 F. (2d) 979	24
Carlin Construction Co. v. Heaney, 299 U. S. 41	9
Comar v. Dept. of Labor and Ind., 187 Wash. 99	24
Crowell v. Benson, 285 U. S. 22	22
Davis v. Dept. of Labor and Ind., 112 Wash. Dec. 163, 121 P. (2d) 365	13
Grant Smith-Porter Co. v. Rohde, 257 U. S. 469	18
Ketchikan Lbr. & Shingle Co. v. Faigh, 24 F. (2d) 63	23
Lahti v. The Terry & Tench Co., Inc., 240 N. Y. 292, 148 N. E. 527	17
Millers' Indemnity Underwriters v. Braud, 270 U. S. 59	11, 16, 17, 18, 20, 22
Mountain Timber Co. v. Washington, 243 U. S. 219	7
Parker v. Motor Boat Sales, Inc., 314 U. S. ....., 62 S. Ct. 221	19, 20, 21, 22
Rock Island Bridge, 6 Wall. 213	16
Rosengrant v. Havard, 273 U. S. 664	11
Southern Pacific Co. v. Jensen, 244 U. S. 205	7

Page

State Ind. Board of N. Y. v. Terry & Tench Co., Inc., 273 U. S. 639 ..... 9, 11, 17, 18, 20, 22
Sultan Ry. & Timber Co. v. Dept. of Labor & Ind., 277 U. S. 135 ..... 7, 11, 18, 20, 25
Sultan Ry. & Timber Co. v. Dept. of Labor & Ind., 141 Wash. 172 ..... 7, 18
Sunny Point Packing Co. v. Faigh, 63 F. (2d) 92 24

TABLE OF STATUTES CITED

United States Statutes
Judicial Code, §237(b) 7, 9, 13
28 U.S.C.A. §344(b) 7, 9, 13
Longshoremen's and Harbor Workers' Act
44 Stat. 1424 ..... 11, 20, 23
33 U.S.C.A. §903(a) 11, 20, 23

Washington Workmen's Compensation Act
Laws 1911, Ch. 74 7
Remington's Revised Statutes of Washington §§7673-7796 7
Remington's Revised Statutes of Washington §7674 ..... 7, 21

Supreme Court of the United States

OCTOBER TERM, 1941

OPAL SAXTON DAVIS, *Petitioner (Appellant below)*, vs. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Respondent (Respondent below)*.	No.....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Opal Saxton Davis, prays that a writ of certiorari issue to review the judgment entered February 16, 1942, in the Supreme Court of the State of Washington (R. 16) in the above entitled cause.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner filed with respondent her claim for pension for herself and minor child under the Washington workmen's compensation act for the accidental death by drowning of her husband on July 8, 1940, while he was engaged in an extra-hazardous occupation (R. 1-2).

Her claim was rejected by the supervisor of industrial insurance upon the ground that the work which

the deceased was doing at the time of the fatal accident did not come under the jurisdiction of the workmen's compensation act, but was maritime in character; that the accident occurred on board a vessel in navigable waters and was therefore under admiralty jurisdiction (R. 3-4).

Upon successive appeals, such action was sustained by the Joint Board (R. 4), by the Superior Court for King County (R. 6-12), and by the Supreme Court of the State of Washington, being the highest court of said state, the latter court's opinion (R. 13-16) being filed January 30, 1942. A petition for rehearing was filed, which was denied by order entered February 16, 1942 (R. 16) and judgment was likewise entered on February 16, 1942 (R. 16).

Complete findings of fact were entered by the Superior Court for King County and have been set forth in full in the Record at pages 6 to 10, inclusive, and may be summarized as follows:

Ancil Evan Davis accidentally drowned in the navigable waters of the Snohomish River, at Everett, Washington, on July 8, 1940, during the course of his employment, being employed as a structural iron worker by Manson Construction & Engineering Co., which was a contributor to the state workmen's compensation fund (Finding I, R. 6).

The Manson company had a contract with the state highway department to build a portion of a new bridge spanning the Snohomish River, at Everett, and, upon its completion, also to dismantle the old drawbridge and remove its draw-rest and piers, the bridges being about 800 feet apart (Finding II, R. 6).

Under its contract, the Manson company was required to stock-pile the steel removed from the old drawbridge, at a place designated as the steel storage site, leased for that purpose by the highway department, located on the north bank of the river about 250 feet north of the draw-rest, or center pier of the drawbridge (Finding IV, R. 7).

[Plaintiff's Exhibit 5 (R. 18A) is an airplane photo taken looking upstream, of that portion of the river which shows the relative locations of the two bridges, the old drawbridge being the one in the center. The steel storage site is the rectangular place marked with an "X" on the north shore of the river.]

On July 2, 1940, the Manson company leased a barge at Everett and with its own tug towed said barge up the river to the drawbridge. Said barge was fastened alongside of a derrick barge belonging to the Manson company, upon which was situated a derrick which was to be used in lowering the steel from the drawbridge onto the rented barge and later to remove the steel from the barge to the steel storage site on shore. The derrick barge was made fast to the north side of the draw-rest, or center pier of the drawbridge, at the downstream or easterly portion of said pier. The tug, derrick barge and rented barge were all licensed vessels (Finding VI, R. 7-8).

The method of loading and unloading the steel removed from the old drawbridge was as follows: The Manson company employed structural iron workers stationed on the span of the old drawbridge to cut the steel beams with oxy-acetylene torches into appropriate lengths for handling. Cables from the derrick on

the derrick barge were attached to each beam before it was cut off, and when completely severed, the boom of the derrick was swung around over the rented barge and the steel beam lowered onto said barge as a temporary storage space until the barge was taken to the shore and the steel unloaded therefrom and stock-piled on the storage site. When the rented barge was loaded with the severed steel beams, said barge and the derrick barge were moved over to the north river bank alongside of the storage site, which required their movement over the navigable waters of Snohomish River, a distance of approximately 200 feet. Said movement was accomplished either by being towed by the Manson company's tug to the north shore of the river, or, if the current was too strong, by putting cables ashore and hauling in on said cables, or by both methods jointly. The steel was then hoisted from the rented barge by means of the derrick boom, which swung around and deposited the steel on the storage site. At the time of decedent's death, the barge on which the steel was being loaded had not been completely loaded and none of the steel had at that time been unloaded and stock-piled on the steel storage site (Finding VII, R. 8).

Decedent was hired by the Manson company on July 2, 1940, as a structural iron worker in connection with its operations in dismantling the drawbridge, and continued in such employ until his death by drowning on July 8, 1940. On the date of his death, his duties were to work on the barge on which the steel was being lowered, to watch the shape of the steel being lowered to the barge, to decide where it

should be placed, and to burn off with oxy-acetylene torches any short stubs of iron hanging to it that would interfere with its being properly piled (Finding VIII, R. 9).

About 9:30 A. M., on July 8, 1940, decedent was last seen standing on the bullrail on the north side of the barge on which the steel was being loaded, about 30 feet from the upstream, or westerly end of the barge. He had discussed with his foreman, Thibeau, the best location to place on the barge a five-ton beam that was about to be severed by the workmen on the draw-span. The foreman at that time was standing on the derrick barge, just west of the steam engine of the derrick. They agreed where the beam was to be placed on the rented barge and the foreman then turned to watch the final cut on the beam. When the beam was cut and the derrick boom started to turn it toward the barge, the foreman noticed that decedent was missing, although only two or three minutes had elapsed since he had last talked with decedent. Decedent's body was recovered from the river about 1:30 P. M. of the same day, about a quarter of a mile downstream (Finding IX, R. 9).

[Plaintiff's Exhibit 6 (R. 18B) taken shortly after decedent's disappearance, shows the relative location of the draw-rest, the derrick barge, and the rented barge onto which the steel was unloaded. The portion of the draw-rest shown in the background in said exhibit is the same as the north side of the easterly end of the draw-rest shown in plaintiff's Exhibit 5 (R. 18A). The letter "D" enclosed in a circle indicates the place on the bullrail of the barge where decedent

was last seen standing, and the letter "T" enclosed in a circle indicates where the foreman, Thibeau, was standing when he last talked with decedent (Finding IX, R. 9). The steel shown on the barge in said exhibit was the first load of steel from the drawbridge, as none had been unloaded on shore up to that time (Finding VIII, R. 8.)].

After reciting the filing and rejection of plaintiff's claim (Finding XI, R. 10) the Superior Court for King County concluded as a matter of law that decedent "at the time of his death was engaged in the performance of a maritime service on a licensed vessel while lying in the navigable waters of the United States; that the employment and duties and locality of the deceased at the time of his death were not matters of purely local concern to which the workmen's compensation act of the State of Washington is applicable, but were directly related to commerce and navigation; and that the plaintiff's rights to recover for the death of her husband are governed exclusively by the law and rules of admiralty jurisdiction" (Conclusion of Law I, R. 10-11).

As a result thereof, judgment of dismissal was entered (R. 11), which was affirmed by the Supreme Court of the State of Washington (R. 13-16).

JURISDICTIONAL STATEMENT

(a) Statutory Provision Sustaining Jurisdiction

The statute believed to sustain appellate jurisdiction is Judicial Code §237(b) as amended, 28 U.S.C.A. §344(b).

(b) State Statute, the Validity of Which Is Involved

The state statute under which petitioner claims a pension is the Washington workmen's compensation act, Chapter 74, Washington Session Laws of 1911, p. 345, as amended, Remington's Revised Statutes of Washington, 1932, §§7673-7796. Since the applicability of said act was held by the highest state court to be excluded by the general maritime law, we merely point out that the Washington workmen's compensation act applies to all extrahazardous employments "which are within the legislative jurisdiction of the state" (Rem. Rev. Stat. of Wash., 1932, §7674; *Sultan R. & T. Co. v. Department*, 141 Wash. 172, 176, affirmed 277 U. S. 135) and thus includes the entire field not excluded from state jurisdiction by the "general maritime law * * * in its international and interstate relations." *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 216. We briefly summarize the provisions of said act by the following quotation from this court's opinion in *Mountain Timber Co. v. Washington*, 243 U. S. 219, at page 228:

> "The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction

over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and for the dependents of those whose injuries result in death."

(c) Date of Judgment Sought to Be Reviewed

The date of the judgment of the Supreme Court of the State of Washington sought to be reviewed is February 16, 1942 (R. 16).

(d) Nature of the Case and the Rulings Below

Petitioner's claim for pension was made in the belief that although her husband lost his life while engaged in work on navigable waters, nevertheless the enterprise in which decedent was engaged at the time he was drowned was in the performance of his employer's contract to dismantle the drawbridge, purely a local matter, regulation of which by the state would work no material prejudice to the characteristic features of the general maritime law or interfere with its uniformity, and having only an incidental relation to navigation and commerce, and therefore the state workmen's compensation act could apply.

This federal question was specifically raised in all the proceedings below, and the Supreme Court of the State of Washington directly ruled on the federal question, which was the only question involved (R. 13-16).

The Department of Labor and Industries had denied the claim upon the ground that the state act was not applicable as the decedent's employment was di-

rectly related to commerce and navigation, and petitioner's rights, if any, were governed exclusively by the laws and rules of admiralty jurisdiction (R. 3-5). Such denial was sustained by both courts below (R. 10-16).

The sustaining of such federal claim against the application of the state workmen's compensation act brings the case directly within the Judicial Code §237(b), as amended, 28 U.S.C.A. §344(b) relied upon.

(e) Cases Sustaining Jurisdiction

The cases believed to sustain the jurisdiction of this court are:

State Industrial Board of N. Y. v. Terry & Tench Co., Inc., 273 U. S. 639 (Certiorari granted 269 U. S. 548);

Alaska Packers Association v. Industrial Accident Commission, 276 U. S. 467 (Certiorari granted 275 U. S. 512);

Carlin Construction Co. v. Heaney, 299 U. S. 41 (Certiorari granted 298 U. S. 637).

QUESTION PRESENTED

Where a structural steel worker was employed in an "extrahazardous" industry by a construction company having a contract with the State Highway Department to dismantle an old drawbridge over the Snohomish River, at Everett, Washington, the steel beams of the drawbridge being cut by acetylene torches by workers on the span, then lowered by means of a floating derrick made fast to the draw-

rest or center pier of the drawbridge, and loaded onto a floating barge tied alongside as a temporary storage space until the steel could be unloaded, as required by the contract, at a storage site on the shore of the river leased by the State, which unloading required the barge to be moved a distance of only 200 feet to shore over the navigable waters of the river, and said worker's duties required him to stand on the barge on which the steel was loaded to watch the shape of the steel being lowered, to decide where it should be placed, and to burn off any short stubs of iron hanging to it that would interfere with its being properly piled, and who, while so employed, fell overboard from the barge into the river and was drowned, was the work in which said worker was engaged at the time of his death:

(a) essentially local in character, having only an incidental relation to navigation and commerce, so that the provisions of the Washington Workmen's Compensation Act providing for a pension to petitioner, as decedent's widow, can be applied without working material prejudice to the characteristic features of the general maritime law or interfere with its uniformity?

or, conversely,

(b) directly related to commerce and navigation, so that petitioner's rights to recover for death of her husband are governed exclusively by the law and rules of admiralty jurisdiction?

REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Supreme Court of the State of Washington (R. 13-16), in holding that the general admiralty law rendered inapplicable the Washington workmen's compensation act to the accident herein involved, has decided a federal question of substance in a way not in accord with the following applicable decisions of this court:

Millers' Indemnity Underwriters v. Braud, 270 U. S. 59;

State Industrial Board of N. Y. v. Terry & Tench Co., Inc., 273 U. S. 639;

Rosengrant v. Havard, 273 U. S. 664;

Alaska Packers Association v. Industrial Accident Commission, 276 U. S. 467;

Sultan Railway & Timber Co. v. Department of Labor & Industries, 277 U. S. 135.

In those cases it was held that the general admiralty law did not render inapplicable the respective state workmen's compensation acts of Texas, New York, Alabama, California and Washington, although the employment involved in each of said cases was maritime in character.

2. The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, in section 3(a) thereof, 33 U.S.C.A. §903(a), expressly limits its application: Making compensation payable "only if * * * recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." The allowance of the writ herein sought will be of assistance to the numerous Deputy

Commissioners of the United States Employees' Compensation Commission for the various compensation districts throughout the United States who are charged with administering said act, as well as to the various state departments or commissions administering their respective state workmen's compensation acts. A review of this case would furnish a clear guide in many cases, especially with the sharp increase in maritime construction and activity arising out of the present war.

For these reasons it is respectfully submitted that this petition should be granted.

Signed: OPAL SAXTON DAVIS,
By MAURICE R. McMICKEN,
OTTO B. RUPP,
ALFRED J. SCHWEPPE,
Counsel for Petitioner.

No. .....

Supreme Court of the United States

OCTOBER TERM, 1941

OPAL SAXTON DAVIS, *Petitioner,*

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1941

OPAL SAXTON DAVIS,
Petitioner (Appellant below),
vs.
DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,
Respondent (Respondent below).

No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF COURT BELOW

The opinion of the Supreme Court of the State of Washington (R. 13-16) was filed January 30, 1942, and is reported in Volume 112 of Washington Decisions (Advance Sheets) pp. 163-167, and in Volume 121 P. (2d) 365-367. It is not yet officially reported.

II.

JURISDICTION

1. The date of the judgment sought to be reviewed is February 16, 1942 (R. 16).

2. The statutory provision believed to sustain the jurisdiction of this court is Judicial Code §237(b), as amended, Title 28 U.S.C.A. §344(b).

3. The grounds on which the jurisdiction of this

court is involved and the cases believed to sustain the jurisdiction of this court are set forth under the heading "Jurisdictional Statement" in the preceding petition, pages 7-9, to which reference is made for the sake of brevity.

III.

STATEMENT OF THE CASE

For the sake of brevity, we refer to the preceding petition, pages 1 to 6.

IV.

SPECIFICATION OF ERROR

The Supreme Court of the State of Washington erred in holding that the general admiralty law rendered inapplicable the Washington workmen's compensation act to the accident herein involved, wherein an employe, working on a barge on navigable waters accidentally fell overboard and was drowned while assisting in dismantling a bridge at Everett, Washington, as more specifically described in the preceding petition.

V.

ARGUMENT

The error assigned raises the single legal question of whether the work in which petitioner's husband was engaged at the time he accidentally drowned was maritime in its nature and governed exclusively by admiralty law, or whether, on the contrary, said work was so far local in character, having only an incidental relation to navigation and commerce, as to permit the application of the state workmen's compensation act

without material prejudice to or interference with the uniformity of maritime law.

Petitioner at all times has contended that, although her husband lost his life while engaged in work on navigable water, nevertheless her rights were to be determined under the state workmen's compensation act, for the reason that the enterprise upon which decedent was at the time engaged was a purely local matter and not concerned with commerce and navigtion.

Just what was the enterprise in which petitioner's husband was engaged at the time he was drowned? The Manson Construction & Engineering Company's contract with the State Highway Department required it to "dismantle the old drawbridge and remove its drawrest and piers" (Finding II, R. 6) and to stock-pile the steel removed from the old drawbridge at a place designated as the steel storage site, on the north bank of the Snohomish River, about 250 feet to the north of the drawrest, or center pier of the drawbridge, which said storage site had been leased by the Washington State Highway Department for that purpose" (Finding IV, R. 7).

In dismantling the drawbridge and stock-piling the steel removed therefrom, the Manson Company utilized its own derrick barge and also a barge which it rented from another concern, which last-mentioned barge was fastened alongside of the derrick barge and was used as a temporary storage space for the dismantled steel until the steel was stock-piled on the adjacent shore (Finding VII, R. 8).

The decedent was hired by the Manson Company

as a structural iron worker, along with other structural iron workers, to dismantle the drawbridge. On the date of his death decedent's duties "were to work on the barge on which the steel was being lowered, to watch the shape of the steel being lowered to the barge, to decide where it should be placed, and to burn off with oxy-acetylene torches any short stubs of iron hanging to it that would interfere with its being properly piled" (Finding VIII, R. 9).

The decedent "drowned before the barge had been completely loaded for the first time, so that none of the steel had been unloaded on shore" (Finding X, R. 9).

Petitioner contends that the enterprise in which the decedent was engaged at the time he was drowned was the performance of his employer's contract to dismantle the drawbridge, which was a purely local matter, regulation of which by the state would work no material prejudice to the general maritime law, and was not concerned with commerce or navigation, and therefore the state law could validly provide compensation.

It must be considered as indisputably established ever since *The Rock Island Bridge*, 6 Wall. 213, that a contract to build or dismantle a bridge is a non-maritime contract, and therefore a local matter.

This court, which is the final arbiter upon what is or is not work of a local nature, has held certain enterprises to be of "merely local concern" to which the respective state compensation acts applied.

In *Millers' Indemnity Underwriters v. Braud*, 270

U. S. 59, a diver working off a floating barge had submerged himself in navigable waters "for the purpose of sawing off the timbers of an abandoned set of ways once used for launching ships which had become an obstruction to navigation" (p. 63). In that case the locality was maritime, the diver's employment in working beneath the surface of navigable waters was maritime, a maritime tort was committed; nevertheless it was held that the nature of the enterprise in which he was engaged was a matter of mere local concern because he was engaged in dismantling a fixed local structure, which, incidentally, had a closer relation to navigation and maritime commerce than has a bridge which is being dismantled. This case, we think, is in principle entirely indistinguishable from the case at bar.

In *State Industrial Board of New York v. The Terry & Tench Co., Inc.*, 273 U. S. 639, reversing *Lahti v. The Terry & Tench Co., Inc.*, 240 N. Y. 292, 148 N. E. 527, "claimant, employed in the construction of a pier, was injured while standing on a floating raft in navigable waters" (148 N. E. 527). This court, reversing the opinion of Cardozo, J., then still a judge of the New York Court of Appeals, did so in a *per curiam* opinion, merely stating "reversed upon the authority of *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59." Here again the tort was a maritime tort, but inasmuch as the enterprise in which claimant was engaged at the time of his injury on the floating raft was the building of a fixed structure, this court held that the matter was one of local

concern to which the state compensation law applied. We must assume, because this court relies on *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59, that if the claimant had been injured on the floating raft while dismantling a pier—a fixed local structure—instead of building it, the result would have been the same. And so here, where the project on which deceased was engaged on the barge was the dismantling of a bridge, the matter must be held to be a matter of local concern only, governed by the state law. The *Terry & Tench* case, again, cannot be distinguished in principle from the case at bar.

There was discussed in the *Braud* case, *supra*, 270 U. S. 59, 63, the previous case of *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, in which it had been held that a carpenter injured while at work upon an uncompleted vessel lying in navigable waters within the State of Oregon was engaged in a non-maritime contract having no direct relation to navigation or commerce and therefore the exclusive remedy prescribed by the Oregon workmen's compensation act precluded him from recovering damages for his injuries except under said act.

In *Sultan Railway & Timber Co. v. Department of Labor & Industries*, 277 U. S. 135 (affirming 141 Wash. 172), there was involved the validity of an order requiring payments into the state workmen's compensation fund of assessments based on the wages of certain employees engaged in log-booming work on the Snohomish River, being the same river on which

the accident occurred in the instant case. It was there stated:

> "The plaintiff in one suit is conducting logging operations, a part of which consists in putting sawlogs into booms, after they have been thrown into a navigable river, so that they conveniently may be towed elsewhere for sale. The men are employed in the booming work. The plaintiff in the other suit conducts a saw mill on the bank of a navigable river. Logs are towed in booms to a point adjacent to the mill and then anchored. The booms afterwards are taken apart and the logs are guided to a conveyor extending into the river and then drawn into the mill for sawing. The men are employed in taking apart the booms and guiding the logs to the conveyor. In both instances the place of work is on navigable water—in one it is done before actual transportation begins and in the other after the transportation is completed.
>
> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity. *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469; *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59; *Alaska Packers Association v. Industrial Accident Commission*, 276 U. S. 467."

In the recent decision, *Parker v. Motor Boat Sales, Inc.*, 314 U. S. ....., 62 S. Ct. 221, delivered December

8, 1941, rehearing denied January 5, 1942, 62 S. Ct. 477, there was involved the meaning of the proviso in Section 3(a) of the Longshoremen's & Harborworkers' Act, 44 Stat. 1424, 33 U.S.C.A. §903(a), which makes compensation payable "only if * * * recovery for the disability or death through workmen's compensation may not be validly provided by State law." We call particular attention to the following portion of the opinion found at 62 S. Ct. on page 225:

> "We believe that there is only one interpretation of the proviso in Section 3(a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the *Jensen* line of decision excluded from state compensation laws."

As there was no dissenting opinion filed, and petition for rehearing was denied (314 U. S. ....., 62 S. Ct. 477), it must be considered that said opinion now definitely decides that the Federal Longshoremen's Act applies only in those fields which the *Jensen* line of decision excluded from state compensation laws, and conversely where the "fields" pertain to matters of "mere local concern" recognized in cases like *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59; *State Industrial Board of N. Y. v. Terry & Tench Co., Inc.*, 273 U. S. 639; and *Sultan Railway & Timber Co. v. Department*, 277 U. S. 135 (cited and discussed above) Congress did not intend the Federal Act to apply, but intended the state compensation laws to continue to apply.

In other words, since the Washington workmen's compensation act applies to all extrahazardous employ-

ments "which are within the legislative jurisdiction of the state" (Rem. Rev. Stat. §7674), said state law includes the entire field not excluded from state jurisdiction by the "Jensen line of decision." Consequently the sole test in the instant case is where the facts fall under the "Jensen line of decision."

The "Jensen line of decision" lays down the line of demarcation between exclusive federal maritime jurisdiction and state jurisdiction, definitely leaving within the field of state legislative jurisdiction all maritime matters of "merely local concern" which do not interfere with the "proper harmony and uniformity of the general maritime law." As pointed out in the cases discussed above, an employee engaged in the enterprise of dismantling a bridge or other local structure, such as a submerged set of ways or a pier, is, even though in the water or upon a barge on the water, engaged in a purely local enterprise, a "merely local matter," to which the state law applies.

In the *Parker* case the employee was engaged in testing a motor boat, and thus clearly engaged in a maritime occupation directly connected with navigation and commerce; and hence, it was rightly held (62 S. Ct. 224) that "under the holding of that case [*Jensen* case] * * * federal jurisdiction is exclusive and state action forbidden in an area, which doubtless embraces the case before us." It was properly ruled, therefore, that the case fell within the exclusive federal domain. In the instant case, however, the facts, under the "Jensen line of decision," clearly relate to a matter of local concern only and are plainly within the field of state jurisdiction.

The Longshoremen's Act was passed in March, 1927. *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59 (1926) and *State Industrial Board v. Terry & Tench Co., Inc.*, 273 U. S. 659 (1926), upon which we rely, were a part of the "Jensen line of decision" when the Longshoremen's Act was passed, and as this court stated in the *Parker* case, Congress "expressly kept out of the area in which 'recovery * * * may be validly provided by state law'" (62 S. Ct. 224).

See, also: *Crowell v. Benson*, 285 U. S. 22, at page 39, and note 3 thereon.

In the instant case the Manson Company's operations, in accordance with its contract, were the demolishing of the drawbridge and placing the steel therefrom in a stock-pile on shore. The placing of the dismantled steel on a barge as a temporary storage space until deposited on shore, which required the barge to be moved about 200 feet over navigable waters of the Snohomish River, was not the engaging in commerce in any sense at all so as to affect "the proper harmony or uniformity of the general maritime law in its international and interstate relations."

In the dismantling operations, it was necessary to rent a barge as a temporary storage space for the dismantled steel. While the dismantled steel on the barge was being unloaded at the stock-pile on shore, the dismantling operations must of necessity have temporarily ceased because the derrick barge was moved to shore with the rented barge and the derrick used to unload the steel on shore (Finding VII, R. 8).

It is thus apparent that the use of the rented barge

for a temporary storage site was just as much a part of the dismantling operations as was the use of the derrick to lower the dismantled steel onto the barge.

The fact that the barge was rented on July 2, 1940 (Finding VI, R. 7), and the accident occurred on July 8, at which time the barge had not yet been fully loaded for the first time (Finding VII, R. 8), and that decedent had been working on the job for the fifth day at the time he was drowned, would indicate that the depositing of the steel on the barge was purely incidental to the dismantling operations and that the Manson Company's enterprise was not the loading of a vessel which was to engage in commerce on the navigable waters or the high seas.

If decedent's employment at the time of his drowning could be said to be maritime in character because working aboard the barge, nevertheless, it was purely incidental to the enterprise in which his employer was engaged, namely, that of dismantling the drawbridge, which was purely of a local character, not connected with navigation or commerce.

Suppose petitioner herein had filed her claim for pension under the Longshoremen's & Harborworkers' Act, 44 Stat. 1424, 33 U.S.C.A. §§901 *et seq.* Under the facts involved herein, the Deputy Commissioner for the 14th Compensation District, in which Washington is situated, would have first had to determine whether the Longshoremen's Act could apply. In view of the proviso to section 3(a) of said act, 33 U.S.C.A. §903(a), and the foregoing cases, as well as the following cases decided by the Circuit Court of Appeals for the Ninth Circuit: *Ketchikan Lumber & Shingle*

Co. v. Bishop, 24 F. (2d) 63; *Sunny Point Packing Co. v. Faigh*, 63 F. (2d) 921, and *Alaska Packers Association v. Marshall*, 95 F. (2d) 279, it is apparent that he would have held that the Longshoremen's Act could not apply because recovery could validly be provided by the Washington workmen's compensation act.

The case of *Comar v. Department of Labor & Industries*, 187 Wash. 99, relied on by the Department and by the courts below as decisive of this case, is not in point as the facts are entirely different. In that case the rock had been transported for hire by barge some 70 or 80 miles over the navigable waters of Puget Sound. Before the rock could be used it had to be unloaded from the barge. Comar was injured while assisting in unloading the rock from the barge, he being on the barge at the time. It was necessary that the barge be unloaded before it could again be released for further transportation service.

The barge there was actively engaged in commercial transportation for hire over navigable waters of Puget Sound to Hood Canal, and since the unloading of it had a direct relation to navigation and commerce it was therefore within the exclusive admiralty jurisdiction, and therefore held that the state workmen's compensation act could not validly apply to the injured workman.

In the instant case the rented barge on which the steel was temporarily stored was not engaged in commercial transportation, but, on the contrary, it was withdrawn from commerce and navigation while the drawbridge was being dismantled.

In the instant case, there was no tort involved, the dismantling of the drawbridge was a non-maritime enterprise, and the barge was being used only as a temporary storage space in connection with such dismantling operations, therefore the application of the Washington workmen's compensation act to this accident would not work "material prejudice to the characteristic features of the general maritime law or interfere with its uniformity." *Sultan Railway & Timber Co. v. Department of Labor & Industries*, 277 U. S. 135.

We earnestly pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Counsel for Petitioner.

Supreme Court, U. S.
15 1942

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1941

No. ~~1211~~ 56

OPAL SAXTON DAVIS, *Petitioner,*

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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INDEX

Page

STATEMENT OF CASE 3

Basis of State Court's Decision 5

ARGUMENT OF RESPONDENT 5

Loading of a Vessel Not a Matter of Mere Local Concern 6

TABLE OF CASES

Alaska Packers Association v. Industrial Accident Commission, 276 U. S. 467 13

Atlantic Transport Co. v. Imbrovek, 234 U. S. 56 7

Comar v. Dept. of Labor and Industries, 187 Wash. 99, 59 P. (2d) 1113 5

Employers' Liability Assurance Corporation v. Cook, 281 U. S. 233 8

International Stevedoring Co. v. Haverty, 272 U. S. 50 7

London Co. v. Industrial Accident Commission, 279 U. S. 109 12

Millers Indemnity Underwriters v. Braud, 270 U. S. 59 12

Minnie v. Port Huron Terminal Co., 295 U. S. 647 9

Moss Tie Co. v. Tanner, 44 F. (2d) 928 13

Murray v. Gerrick & Co., 291 U. S. 315, 54 S. Ct. 432 11

Nogueira v. N. Y., N. H. & H. R., 281 U. S. 128 ..... 5, 8

Northern Coal & Dock Co. v. Strand, 278 U. S. 142 7

Parker v. Motor Boat Sales, Inc., 314 U. S. 244, 62 S. Ct. 221 ... 10, 13

Plymouth, The, 70 U. S. (3 Wall.) 20 5

Raithmoor, The, 186 Fed. 849 5

Rosengrant v. Havard, 273 U. S. 664 13

Ross, In Re Sanford, 196 Fed. 921 5

South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251 ..... 9, 10

Southern Pacific Co. v. Jensen, 244 U. S. 205 ..... 5, 6, 10

State Industrial Board v. Terry & Tench Co., 273 U. S. 639 13

Sultan Railway and Timber Co. v. Dept. of Labor and Industries, 277 U. S. 135 13

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STATEMENT OF CASE

Ancil Evan Davis, husband of petitioner, met his death by accidental drowning in the Snohomish River (an arm of Puget Sound) near Everett, Washington, while employed upon a licensed and registered barge by the Manson Construction and Engineering Company on July 8, 1940. The decedent was engaged at the time of his death in loading steel beams on the barge, which were placed thereon by a derrick anchored to a barge after being removed from an abandoned highway which was

being dismantled by the employer under contract with the Washington State Highway Department (Finding 7, R. 8). The barge, upon which the deceased was employed at the time of his death, was of the seagoing type (see Ptlfs. Exhibit 6, R. 18B) chartered by the employer for the project and by it towed to the site of the loading operations by the employer's tug.

When loaded with its cargo of steel, the barge was either towed by the tug or pulled by cables (depending upon the current) a distance of about 200 feet where it was then unloaded on the shore and later sold as junk (Finding 5, R. 7). Had the deceased survived, he would have accompanied the barge after loading as it was being towed along navigable waters to the unloading site and assisted in the unloading thereof (Finding X, R. 9). By trade, the deceased was a structural iron worker and part of his duties in loading the barge was to burn off iron stubs projecting from the steel to facilitate its loading.

The respondent, the state agency charged with the administration of the Washington's workmen's compensation act, rejected the petitioner's claim for widow's compensation for the reason "the injury was sustained on board a vessel in navigable waters and therefore under admiralty jurisdiction" (R. 3, 4). The joint board, respondent's appellate tribunal, affirmed (R. 5). On review, the Superior Court of King County concluded deceased's employment and death were not matters of local concern to which the Washington state compensation act was applicable, but were directly related to commerce and navigation, and petitioner's rights were governed by admiralty (Concl. I, R. 10), and dis-

missed petitioner's appeal for lack of jurisdiction. The Supreme Court of the State of Washington affirmed (R. 13-16).

Basis of State Courts Decision

The respondent and the Superior and Supreme Courts of the State of Washington concluded petitioner's rights were governed by a prior adjudication of the Supreme Court of the State of Washington in the case of *Comar v. Department of Labor and Industries*, 187 Wash. 99, 59 P. (2d) 1113, wherein the relevant federal decisions were reviewed. It was there held that where a workman, usually employed on the shore, was sent aboard a barge lying in navigable waters for the purpose of piling up sand for removal by a clam shovel, and was injured when so engaged, he could not be encompassed within the ambit of the state workmen's compensation act "since the unloading of a barge was a maritime transaction, not of purely local concern," (187 Wash. 103) but his remedy lay within the exclusive admiralty jurisdiction.

ARGUMENT OF RESPONDENT

The barge upon which deceased was drowned was a vessel within admiralty jurisdiction, though not self propelled.

The Raithmoor, 186 Fed. 849;
In re Sanford Ross, 196 Fed. 921;
Nogueira v. N. Y., N. H. & H. R., 281 U. S. 128.

Since the injury occurred on navigable waters, it was of admiralty cognizance.

The Plymouth, 70 U. S. (3 Wall.) 20.

However, since the decision by the United States Supreme Court in 1917, in the case of *Southern Pacific v.*

Jensen, 244 U. S. 205, state workmen's compensation acts have been held applicable to a limited type of injuries occurring on navigable waters, denominated "of mere local concern" when such application pertains to local matters, having only an incidental relation to navigation and commerce and does not

"* * * works material prejudice to the characteristic features of the general maritime law, or interfere with its uniformity." *(Southern Pacific v. Jensen, supra.)*

In the *Jensen* case, however, a workman injured on navigable waters while unloading a ship was held not embraced in the category of "mere local concern," but his rights were to be determined by the maritime law.

The findings of fact in this case establish that the husband of petitioner met his death by drowning while engaged in loading a barge on navigable waters. Such employment and locale of injury have been held in a series of cases decided by the United States Supreme Court not matters of local concern to which the state workmen's compensation acts were applicable but committed irrevocably to the exclusive admiralty jurisdiction by the necessity of uniform maritime rules, and article IV, section II, subdivision I of the United States Constitution and section 256 of the United States Judicial Code.

LOADING OF A VESSEL NOT A MATTER OF MERE LOCAL CONCERN

Even before the *Jensen* case, *supra*, the Supreme Court of the United States, in construing the rights of a person injured on navigable waters while engaged in loading a ship, held such employment to be exclusively within the purview of the maritime jurisdiction.

In *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 56 (1914), at page 61, the court said:

"The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' * * * "

A person engaged in loading freight as a stevedore was even held to be a seaman by the United States Supreme Court in the case of *International Stevedoring Co. v. Haverty*, 272 U. S. 50, reversing a decision of the Washington Supreme Court, reported in 134 Wash. 235.

In *Northern Coal & Dock Co. v. Strand*, 278 U. S. 142, the workman was engaged in what has been denominated as an amphibious occupation working the greater part of the time upon land in unloading coal but at other times being employed upon the ship in a similar capacity. He was killed while employed on the ship. In determining the status of his employment and its exclusive relation to the maritime jurisdiction, the court said, at page 144:

"Strand's employment contemplated that he should labor both upon the land and the water. When killed he was doing longshore or stevedore work on a vessel lying in navigable waters, according to his undertaking. His employment, so far as it pertained to such work, was maritime; the tort was maritime; and the rights of the parties must be ascertained upon a consideration of the maritime law. * * *

"The unloading of a ship is not matter of purely local concern. It has direct relation to commerce and naviga-

tion, and uniform rules in respect thereto are essential. The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred."

In *Nogueira v. N. Y., N. H. & H. R. Co.*, 281 U. S. 128, the workman was employed by the railroad company to load freight into cars on a float and sought to recover in an action under the federal employers' liability act. It was held that his remedy was within the exclusive admiralty jurisdiction. The court citing the *Jensen* and *Imbrovek* cases, *supra*, as authorities fixing the workman's status as maritime employment, at page 134, said:

"From the standpoint of maritime employment, it obviously makes no difference whether the freight is placed in the hold or on the deck of a vessel, or whether the vessel is a car float or a steamship. A car float in navigable waters is subject to the maritime law like any other vessel. The injury caused to petitioner in this case is thus as much within the exclusive admiralty and maritime jurisdiction as was that of the employee in *Southern Pacific Company v. Jensen*, *supra*, and recovery for the injury 'through workmen's compensation proceedings' could not 'validly be provided by state law.' "

The case of *Employers' Liability Assurance Corporation v. Cook*, 281 U. S. 233, is of particular persuasive force in this case. The district court had held that where an employee of the Ford Motor Company regularly employed as a mechanic had been assigned to unloading a ship on navigable waters and was injured, that the matter was of mere local concern and the Texas workmen's compensation act afforded him relief. The Supreme Court of the United States sharply dissented from this view, holding that the unloading of a ship is never a matter of purely local concern. The court said at page 236:

" * * * Whether Cook's employment contemplated that he should work regularly in unloading vessels

or only when specially directed so to do is not important. The unloading of a ship is not matter of purely local concern as we have often pointed out. Under the circumstances disclosed the State lacked power to prescribe the rights and liabilities of the parties growing out of the accident. * * * "

Where a longshoreman unloading a vessel lying in navigable waters was struck on the ship and precipitated upon the wharf, it was held in *Minnie v. Port Huron Terminal Co.*, 295 U. S. 647, that he was injured on navigable waters while engaged in a maritime service and his rights were governed exclusively by the maritime law.

A recent case to reach the United States Supreme Court was *South Chicago Coal and Dock Company v. Bassett*, 309 U. S. 251, decided February 26, 1940. The deceased in that case was employed on a lighter used for fueling steam boats on navigable waters. His duties consisted mainly of facilitating the flow of coal from his boat to the vessel being fueled and removing obstructions to the flow with a stick. He performed such additional tasks as throwing the ship's rope in releasing or making the boat fast. He performed no navigation duties. He was paid an hourly wage and slept at home. In holding that the deceased was not a seaman but was entitled to the benefits of the longshoremen's and harbor workers' compensation act, the court described the status of the deceased as follows:

"* * * What the court considered as supporting the finding of the deputy commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on

the water.' *Scheffler v. Moran Towing Co.*, 68 F. (2d) 11, 12. • • •"

The foregoing list of authorities establishes the rule that a person, such as the decedent in this case, who is engaged in loading a vessel upon navigable waters is employed exclusively under a maritime contract, the rights and liabilities of which must be adjudicated under the exclusive admiralty jurisdiction, and that such activities are not local in character so as to permit the application of the state compensation acts thereof, and this result follows whether decedent be classified as a longshoreman or as a casual worker under the doctrine of the *Bassett* case, *supra*.

In addition to the maritime character of decedent's employment, that of loading a vessel on navigable waters, further consideration should be given to the effect such application of the local law should have to a registered seagoing barge such as the decedent was employed on when drowned. The rationale of the *Jensen* case, *supra*, prohibits vessels on navigable waters from being harassed with conflicting state regulatioins with resultant impairment of the uniformity of the maritime law. If the Washington act is applicable here, so would the varying compensation enactments of Oregon and California, if the barge should journey there and be engaged under similar circumstances. A frustration of the desideratum of the *Jensen* case would ensue. The decision of the *Jensen* case and application of its line of demarcation has only been recently reaffirmed by the United States Supreme Court in the case of *Parker v. Motor Boats Sales*, 314 U. S. 244, 62 S. Ct. 221, decided December 8, 1941, which revitaiizes the doctrine of that case as to the non-intrusion of the local law to exclusively maritime torts.

Had petitioner's husband while on board the cargo barge been injured because of the negligence of a colliding vessel, can it be doubted his remedy against the offending vessel would be prescribed exclusively by the maritime law? If two systems of indemnity are available to a workman injured on navigable waters, dependent upon how the tort arose, an incongruous note would be injected into a field which the Supreme Court of the United States has decreed must be uniform. Such a result was prescribed in the case of *Murray v. Gerrick & Co.*, 291 U. S. 315, 54 S. Ct. 432, where the question arose in a non-maritime setting.

It is not accurate and may be misleading to characterize the decedent as engaged in dismantling a bridge at the time he was drowned, as petitioner does. The employer of decedent had a contract to dismantle a bridge. In so far as these operations were conducted on land, undoubtedly the local law applied. But the decedent was specifically engaged on the day of his death in loading a barge on navigable waters which subjected him to different rules of law than if he had been employed upon land in the demolition project. Similarly, cataloguing the cargo barge upon which decedent was employed when drowned as "a temporary storage space" as petitioner frequently does, cannot detract from the essential maritime character and service of the vessel at the time of decedent's drowning. While analyzing the nomenclature employed by petitioner, it might be pertinent to point out that after being unloaded from the cargo barge to "stock pile" it on the shore, the steel was thereafter sold to a junk company and thus entered the general avenues of trade and commerce of the state and nation.

Nor is it of any consequence that the cargo barge when loaded was only to proceed 200 feet along the navigable water before its cargo was unloaded. Maritime jurisdiction stems from the fact that the injury or tort occurs on navigable water and not upon the length of the journey involved.

This point was made clear by the United States Supreme Court in *London Co. v. Industrial Commission*, 279 U. S. 109, where, in answer to a similar contention, the Supreme Court of the United States said:

"Another objection to the admiralty jurisdiction here is that the vessel was not engaged in interstate or foreign commerce. It was employed only to run from shore to Santa Monica Bay, five or ten miles to the deep sea fishing place, and then return, and all within the jurisdiction of California. This argument is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one State to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in Article 3, Section 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction."

Analysis of Cases Relied Upon by Petitioner for Allowance of Writ

None of the cases cited by petitioner in support of her application for a writ of certiorari involve the loading of a vessel on navigable waters, but refer to factual situations held local in character and supporting the application of the local law in a setting quite different than that in which deceased lost his life. *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59, involved the death of a diver engaged in sawing off an abandoned set of ways and the state law was held applicable. This deci-

sion undoubtedly was bottomed upon the observation of the Texas Supreme Court (216 S. W. 137) that the ways were a mere prolongation of the land since they were an abandoned dry-dock.

Similarly, can the decision in *State Industrial Board v. Terry & Tench Co.*, 273 U. S. 639, be explained, since the workman while stationed on a floating raft when injured was employed in the construction of a pier, likewise an extension of the land. *Rosengrant v. Havard*, 273 U. S. 664, merely involved the denial of a writ of certiorari to review a compensation award for the death of a lumber checker killed while on a floating barge, who could have performed this work just as well on shore. This decision was later explained by the Circuit Court of Appeals for the Fifth Circuit in the later case of *Moss Tie Company v. Tanner*, 44 F. (2d) 928, as based upon the grounds that the duties of the injured lumber inspector had no relation to carriage of the lumber by water or delivery of it from the barge upon termination of that carriage.

Alaska Packers Association v. Industrial Accident Commission, 276 U. S. 467, involved injuries to a cannery employee received on shore while pushing a boat in navigable waters, and the local law was held applicable. The same result was reached in *Sultan Railway and Timber Co. v. Department of Labor and Industries*, 277 U. S. 135, affirming the decision of the Washington Supreme Court (141 Wash. 172) that workmen employed on navigable waters in assembling and disassembling saw logs for mill-run purposes were amenable to the state compensation act. The recent case of *Parker v. Motor Boat Sales, supra*, reiterates the doctrine of exclusive jurisdiction in all matters not of mere local concern against state en-

croachment and denied the application of the Virginia compensation act to the death of a janitor occurring while riding in a boat in navigable waters at the instance of his employer. It was held despite the fact that the employment was predominantly non-maritime, the remedy of his beneficiaries was prescribed by the longshoremen's and harbor workers' compensation act.

Since the Washington State Supreme Court correctly concluded that the death of the deceased husband of petitioner was not a mere matter of local concern to which state jurisdiction could attach since he met his death while loading a vessel on the navigable waters of the United States, we earnestly pray that the petition for writ of certiorari in this cause be denied.

Respectfully submitted,

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No. 86

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Petition of the Respondent for a Rehearing

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Petition of the Respondent for a Rehearing

Comes now the above named respondent, Department of Labor and Industries of the State of Washington, and presents this, its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

Since the majority opinion is bottomed upon certain assumptions and surmises not contained in the record presented to the court for its consideration, and which are factually incorrect, respondent feels

it is under a duty to the court to correctly advise it as to such mistaken assumptions of fact to the end that the rationale of the published decision may be modified to conform to the true facts in the case.

These erroneous factual assumptions are (1) that the Manson Construction and Engineering Company, employer of petitioner's deceased husband, had failed to secure compensation upon the deceased at the time he was drowned, under the Longshoremen's and Harbor Workers' Compensation Act, and faced severe penalties under that act as a defaulting employer if the decision of the Washington Supreme Court were sustained holding petitioner had no rights under the state compensation act; and (2) that petitioner would be remediless unless awarded state compensation since she had filed no claim under the Longshoremen's and Harbor Workers' Compensation Act and was presumptively barred from so doing.

At the outset, it may be pointed out that neither of these matters appeared in the record transmitted to this court, nor in the written briefs or oral arguments of the parties, since such factors are irrelevant and immaterial to the jurisdictional question confronting the court. The reach of the exclusive federal admiralty jurisdiction is not influenced by the interpretation placed upon it by private persons, who may or may not correctly apprehend its scope. In this particular case, it is to be spelled out from the

long line of decisions since the *Jensen* case construing section two of article 3 of the United States Constitution, and the more recent decisions defining the exclusive scope of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. Sec. 901 *et seq.*). No prior decision of this court or of any other court we are aware of can be cited to justify resort to such extrinsic and irrelevant considerations in resolving the scope of the exclusive federal admiralty jurisdiction.

Employer Had Dual Compensation Coverage Under Both State and Federal Acts

The Manson Construction and Engineering Company, employer of decedent's husband, covered him not only under the Washington State Compensation Act, but likewise secured compensation upon the decedent under the Federal Longshoremen's and Harbor Workers' Compensation Act, through its insurance carrier, United Pacific Insurance Company. Consequently the apprehension expressed by the majority opinion, and which materially influenced its judgment, that the employer might be subjected to penalties, fines and imprisonment under the latter act if petitioner's recovery is under the federal act, is utterly groundless.

PETITIONER HAD FILED A CLAIM UNDER LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

In addition to filing a claim for compensation under the state act, the petitioner, on September 9, 1940, filed a claim under the federal act, with the deputy commissioner, 14th District, at Seattle, Washington, being numbered No. 625-1.

On October 3, 1940, petitioner, through her attorneys, and the insurance carrier through its attorney, addressed the following joint communication to the deputy commissioner:

"Seattle, Wash.
Oct. 3, 1940,

"Wm. A. Marshall,
Deputy Commissioner,
U. S. Employees Commission,
District No. 14,
Federal Office Bldg.,
City.

In re: *Ancil Evan Davis, deceased*

"Dear Sir:

On or about Sept. 9, 1940, a claim was filed by Opal Saxton Davis, as widow of the above named decedent for compensation under the Longshoremen's and Harbor Workers' Compensation Act, and thereafter objections to its allowance was filed by United Pacific Insurance Company, the insurance carrier for Mr. Davis's employer, Manson Construction Co.

"We hereby respectfully request that hearing on said claim be held in abeyance by you pending further proceedings to be taken on Mrs. Davis's behalf to secure a reversal of the rejection of Mrs. Davis's claim previously filed with the state of Washington

Department of Labor & Industries under the state workmen's compensation act.

"This request is made so Mrs. Davis's rights under the Federal Act will be protected in case it is finally held she is not entitled to compensation under the state compensation act.

Very truly yours,
(Sig.) McMicken, Rupp and Schweppe
By Maurice McMicken,
United Pacific Insurance Co.
By Geo. Bovingdon,
Its attorney."

By a subsequent communication, the insurance carrier, on March 23, 1942, advised the deputy commissioner it was advancing compensation to petitioner pending outcome of the litigation to test the jurisdictional question involved. Here again, the majority opinion fell into error in assuming petitioner, after this lapse of time, might be barred in obtaining relief under the federal act by the statute of limitations and the hardships existing in *Ayers v. Parker*, 15 F. Supp. 447, cited in the majority opinion do not obtain here. It is obvious that at all times petitioner has been correctly advised by her able counsel in the prosecution of her claims, and if this court holds that her remedy lies under the federal act, she is properly able to assert them before the appropriate federal agency at this time.

EXCLUSIVENESS OF FEDERAL COMPENSATION ACT

As the Chief Justice comments in his dissenting opinion, by explicit language, Congress has decreed that "if there is liability under the Federal act, that liability is exclusive." 33 U. S. C. 905 provides in part, as follows:

"EXCLUSIVENESS OF LIABILITY.

"The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, * * *"

This court held the Longshoremen's and Harbor Workers' Compensation Act exclusive in the case of *Nogueria v. N. Y., N. H. and H. R.*, 281 U. S. 128, and gave full effect to the above provision. No prior decision of this court sanctions construing this statutory language as permitting concurrent state jurisdiction where the injury occurs in maritime employment on navigable waters merely because the case confronting the court may appear to be a close one.

Nor is this result justified by 33 U. S. C. 903 (a) which provides federal coverage "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law," for this provision was only recently construed by this court in the case of *Parker v. Motor Boat Sales, Inc.*, 314 U. S. 244, as being limited by the

Jensen line of decisions. The writer of the majority opinion in this case, there said in defining permissible state jurisdiction of maritime injuries,

"The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in § 3 (a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the *Jensen* line of decision excluded from state compensation laws. * * *"

In the *Motor Boat Sales* case, this court held inapplicable the Virginia Compensation Act to the death by drowning of a janitor, who was riding in a fifteen-foot rowboat, for the reason he was engaged in what the court there defined as "clearly maritime activity." In the instant case, which was not considered by the court, in the frame of the *Jensen* decision and its following cases, against the objection of its state courts, Washington is obliged to award compensation to the widow of a workman drowned in navigable waters while engaged in supervising the loading and stowage of a cargo of steel rails on a barge, heretofore always considered by this court as being an enterprise exclusively committed to the federal admiralty jurisdiction upon the grounds of presumed state jurisdiction.

In the *Motor Boat Sales* case, the majority opinion now explains that federal jurisdiction could be explained there because of presumptive weight given

the federal administrative agency's findings in view of 33 U. S. C. 920, which provides "jurisdiction is to be presumed in the absence of substantial evidence to the contrary." The majority opinion then says it must give "great—indeed, presumptive—weight" to the state statutes themselves. This it does not do. Rem. Rev. Stat., section 7697, provides as to the efficacy of findings by the state administrative agency involved here, as follows: "In all court proceedings under or pursuant to this act the decision of the department shall be *prima facie* correct and the burden of proof shall be upon the party attacking the same." Two courts of the State of Washington have held the state agency correctly "construed the law and found the facts." (Rem. Rev. Stat., section 7697.) Certainly the findings of the state agency as to non-jurisdiction, reinforced by the approval of the courts of the State of Washington, are entitled to just as persuasive a presumption as those of a federal agency finding jurisdiction.

The administrative difficulties which the "twilight zone" doctrine will impose upon both state and federal administrative agencies press strongly for reconsideration of this recently announced doctrine. Employers will be compelled to make double premium contributions while their injured workmen and beneficiaries shop on the compensation counter and select the benefits of the most financially advantageous act; both state and federal administrative

agencies before adjudicating a compensation claim will have to be advised of the coverage obtained by the employer and as to whether a claim has been filed with the other agency. The lines of demarcation between state and federal jurisdiction in admiralty matters which have been long and painfully hewn out since the *Jensen* case in 1917, to the *Motor Boat Sales* case in 1941, will be obliterated.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Supreme Court be, upon further consideration, reversed.

Respectfully submitted,

SMITH TROY,
Attorney General of the State of Washington,

EDW. S. FRANKLIN,
Special Assistant Attorney General,
Counsel for Respondent.

CERTIFICATE OF COUNSEL

I, Edw. S. Franklin, Special Assistant Attorney General and one of the counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

EDW. S. FRANKLIN,
Of Counsel for Respondent.

p 6.

SUPREME COURT OF THE UNITED STATES.

No. 86.—October Term, 1942.

Opal Saxton Davis, Petitioner,
vs.
Department of Labor and Industries of the State of Washington.

On Writ of Certiorari to the Supreme Court of the State of Washington.

[December 14, 1942.]

Mr. Justice Black delivered the opinion of the Court.

In this case the Washington Supreme Court held that the state could not, consistently with the Federal Constitution, make an award under its state compensation law to the widow of a workman drowned in a navigable river. The circumstances which caused the court to reach this conclusion were these:

The petitioner's husband, a structural steelworker, was drowned in the Snohomish River while working as an employee of the Manson Construction and Engineering Company, a contributor to the Workmen's Compensation Fund of the State of Washington. Contributions of Washington employers to this Fund are compulsory in certain types of occupations, including the job for which the deceased had been employed. Rem. Rev. Stat. of Wash. 1932, § 7674. That job was to dismantle an abandoned drawbridge which spanned the river. A part of the task was to cut steel from the bridge with oxyacetylene torches and move it about 250 feet away for storage there to await delivery to a local purchaser. The steel when cut from the bridge was lowered to a barge by a derrick; and when loaded, the barge was to be towed by a tug, hauled by cable, or, if the current made it necessary, both towed and hauled to the storage point. Three vessels which had been brought there along the stream, for use by the employer in the work—a tug, derrick barge, and a barge,—were all licensed by the U. S. Bureau of Navigation. The derrick barge was fastened to the bridge; the barge was tied to the derrick barge. Deceased had helped to cut some steel from the bridge and, at the time of the accident, was working on the barge which had not yet been completely loaded for its first carriage of steel to the place of storage. His duty appears to have been to examine the steel after it was lowered

to the barge and, when necessary, to cut the pieces to proper lengths. From this barge he fell or was knocked into the stream in which his body was found.

The Washington statute provides compensation for employees and dependents of employees, such as decedent, if its application can be made "within the legislative jurisdiction of the state." A further statement of coverage applies the Act to "all employers or workmen . . . . . engaged in maritime occupations for whom no right or obligation exists under the maritime laws." Rem. Rev. Stat. Wash. §§ 7674, 7693a. A line of opinions of this Court beginning with *So. Pac. Co.* v. *Jensen*, 244 U. S. 205, 216, held that under some circumstances states could but under others could not, consistent with Article III, Par. 2 of the Federal Constitution,[1] apply their compensation laws to maritime employees. State legislation was declared to be invalid only when it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." When a state could and when it could not grant protection under a compensation act was left as a perplexing problem, for it was held "difficult, if not impossible" to define this boundary with exactness.

With the manifest desire of removing this uncertainty so that workers whose duties were partly on land and partly on navigable waters might be compensated for injuries, Congress on October 6, 1917, five months after the *Jensen* decision, passed an Act attempting to give such injured persons "the rights and remedies under the workmen's compensation law of any state." 40 Stat. 395. May 17, 1920, this Court declared the Act unconstitutional. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149. June 10, 1922, 42 Stat. 634, Congress made another effort to permit state compensation laws to protect these waterfront employees, but this second effort was also held invalid. *State of Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219. March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, 33 U. S. C. § 901 *et seq.* Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only "if recovery for the disability or death

[1] This Article extends the jurisdiction of Federal Courts "to all cases of admiralty and maritime Jurisdiction."

through workmen's compensation proceedings may not validly be provided by state law."

Harbor workers and longshoremen employed "in whole or in part upon the navigable waters" are clearly protected by this Federal Act; but, employees such as decedent here occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins of state authority must "be determined in view of the surrounding circumstances as cases arise." *Baizley* v. *Stan*, 281 U. S. 222, 230. The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here.[2]

The very closeness of the cases cited above and others raising related points of interpretation has caused much serious confusion.[3] It must be remembered that under the *Jensen* hypothesis, basic conditions are factual: Does the state law "interfere with the proper harmony and uniformity of" maritime law? Yet em-

[2] Cases which lend strength to petitioner's position are: Sultan Railway & Timber Co. v. Dept. of Labor, 277 U. S. 135; Grant Smith-Porter Co. v. Rohde, 257 U. S. 469; Miller's Underwriters Co. v. Braud, 270 U. S. 59; Ex parte Rosengrant, 213 Ala. 202, affirmed 273 U. S. 664; State Industrial Board of N. Y. v. The Terry & Tench Co., Inc., 273 U. S. 639 reported as Lahti v. The Terry & Tench Co., 240 N. Y. 292; Alaska Packers Assn. v. Industrial Accident Commission, 276 U. S. 467. And note the dissenting view in Baizley v. Stan, *supra*; U. S. Casualty Co. v. Taylor, 64 F. 2d 521, cert. den. 290 U. S. 639; New Amsterdam Casualty Co. v. McManigal, 87 F. 2d 332; In re Herbert, 283 Mass. 348. Cases aiding respondent's view: Baizley v. Stan, 281 U. S. 222; Gonsalves v. Morse Dry Dock, 266 U. S. 171; Nogüera v. N. Y., N. H. & Hartford, 281 U. S. 128; Northern Coal Co. v. Strand, 278 U. S. 142; Liability Assurance Co. v. Cook, 281 U. S. 233. For a number of state cases supporting each position see the Circuit Court opinion in Motor Boat Sales v. Parker, 116 F. 2d 7889. For discussion of the problem see Morrison, Workmen's Compensation and the Maritime Law, 38 Yale L. J. 472.

[3] State industrial commissions have found real difficulty in determining their proper function in respect to maritime accidents. See the discussion of this problem at the 19th Annual Meeting of the International Association of Industrial Accident Boards and Commissions, Bull. 577 of the Bureau of Labor Statistics, p. 119 (1933). A question not mentioned above which has been considered in several cases is that of the jurisdiction to which it is to be assigned accidents affecting persons loading boats while on the wharf; accidents affecting persons loading vessels while on the vessel; accidents affecting persons standing on either the vessel or the wharf who are knocked into the water. Smith & Sons v. Taylor, 276 U. S. 179; Vancouver S. S. v. Rice, 288 U. S. 445; Minnie v. Port Huron Terminal, 295 U. S. 647.

ployees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership. As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere. See e. g., *Ayres* v. *Parker*, 15 F. Supp. 447. Such a result defeats the purpose of the federal act, which seeks to give "to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation", and the state acts such as the one before us which aims at "sure and certain relief for workmen."[4]

The horns of the jurisdictional dilemma press as sharply on employers as on employees. In the face of the cases referred to above, the most competent counsel may be unable to predict on which side of the line particular employment will fall. The employer's contribution to a state insurance fund may therefore wholly fail to protect him against the liabilities for which it was specifically planned. If this very case is affirmed for example, the employer will not only lose the benefit of the state insurance to which he has been compelled to contribute and by which he has thought himself secured against loss for accidents to his employees; he must also, by virtue of the conclusion that the employee was subject to the federal act at the time of the accident, become liable for substantial additional payments. He will also be subject to fine and imprisonment for the misdemeanor of having failed, as is apparently the case, to secure payment for the employee under the federal act. 33 U. S. C. §§ 938, 932.

We are not asked here to review and reconsider the constitutional implications of the *Jensen* line of decisions. On the contrary, even the petitioner argues that such action might bring about still worse confusion in an already uncertain field, and points out that state and federal agencies have made real progress toward closing the gap. There is much force in this argument. Since 1917, Congress and the states have sought to restore order out of the confusion which resulted from the *Jensen* decision. That success has not

[4] For this expression of federal policy see the report of the Senate Committee on the Judiciary on the Longshoremen's and Harbor Workers' Compensation Act, S. R. 973, 69th Cong., 1st Sess., 16. For the expression of public policy of the Washington Act, see Rem. Rev. Stat. of Wash. (1932) § 7673.

finally been achieved is illustrated by the present case. The Longshoremen's Act passed with specific reference to the *Jensen* rule, provided a partial solution. The Washington statute represents a state effort to clarify the situation. Both of these laws show clearly that neither was intended to encroach on the field occupied by the other. But the line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side. Overruling the *Jensen* case would not solve this problem. In our decision in *Parker* v. *Motor Boat Sales*, 314 U. S. 244, we held that Congress has by the Longshoremen's Act accepted the *Jensen* line of demarcation between state and federal jurisdiction. Obviously the determination of the margin becomes no simpler because the standard applied is considered to be embedded in a statute rather than in the Constitution. Nor can we gain assistance in this circumstance from the clause in the federal act which makes that act exclusive. 33 U. S. C. § 905. That section gains meaning only after a litigant has been found to occupy one side or the other of the doubtful jurisdictional line and is no assistance in discovering on which side he can properly be placed.

There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.

Faced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There we are aided by the provision of the federal act, 33 U. S. C. § 920, which provides that in proceedings under that act, jurisdiction is to be "presumed in the absence of substantial evidence to the contrary." Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in *Parker* v. *Motor Boat Sales*, *supra*.

In the instant case we do not enjoy the benefit of federal administrative findings and must therefore look solely to state sources for guidance. We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state. The problem here is comparable to that in another field of constitutional law in which courts are called upon to determine whether particular state acts unduly burden interstate commerce. In making the factual judgment there, we have relied heavily on the presumption of constitutionality in favor of the state statute. *S. C. Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 188, 191.[5]

The benefit of a presumption is also given in cases of conflict of state or state and territorial workmen's compensation acts under the Full Faith and Credit clause. There, as here, the issue is a factual one arising from a clash of interest of two jurisdictions. In such a case involving the question of whether the California or the Alaska Workmen's Compensation Act should apply to a resident of California injured in Alaska who brought suit in California, this Court has said: "The enactment of the present statute of California was within state power and infringes no constitutional provision. *Prima facie*, every state is entitled to enforce in its own courts its own statutes, lawfully enacted." *Alaska Packers Assn.* v. *Industrial Commission*, 294 U. S. 532, 547. And see *Pacific Ins. Co.* v. *Industrial Commission*, 306 U. S. 493, 503.

Not only does the state act in the instant case appear to cover this employee, aside from the constitutional consideration, but no conflicting process of administration is apparent. The federal authorities have taken no action under Longshoremen's Act, and it does not appear that the employer has either made the special payments required or controverted payment in the manner prescribed in the Act. 33 U. S. C. § 914 (b) and (d). Under all the circumstances of this case we will rely on the presumption

[5] See for other examples of our application of this principle, Southern Ry. v. King, 217 U. S. 524 (statute regulating operation of interstate trains at crossings); Pure Oil Co. v. Minnesota, 248 U. S. 158 (statute requiring the inspection of certain petroleum products while in interstate commerce); Interstate Busses Corp. v. Holyoke Ry., 273 U. S. 45 (requirement of certificate of convenience and necessity for interstate carrier); Interstate Busses v. Blodgett, 276 U. S. 245 (state statute taxing interstate carrier); Railway Exp. Agency v. Virginia, 282 U. S. 440 (statute requiring corporation to hold local charter). For state commerce regulations approved by this Court, see the Barnwell case, *supra*, p. 188, n. 5.

of constitutionality in favor of this state enactment; for any contrary decision results in our holding the Washington act unconstitutional as applied to this petitioner. A conclusion of unconstitutionality of a state statute can not be rested on so hazardous a factual foundation here any more than in the other cases cited.

Giving the full weight to the presumption, and resolving all doubts in favor of the Act, we hold that the Constitution is no obstacle to the petitioner's recovery. The case is remanded for proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice FRANKFURTER, concurring.

Any legislative scheme that compensates workmen or their families for industrial mishaps should be capable of simple and dependable enforcement. That was the aim of Congress when, with due regard for the diverse conditions in the several States, it afforded to harbor workers the benefits of state workmen's compensation laws. Act of October 6, 1917, c. 97, 40 Stat. 395, as amended by the Act of June 10, 1922, c. 216, 42 Stat. 634. But *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and cases following, frustrated this purpose.

Such a desirable end cannot now be achieved merely by judicial repudiation of the *Jensen* doctrine. Too much has happened in the twenty-five years since that ill-starred decision. Federal and state enactments have so accommodated themselves to the complexity and confusion introduced by the *Jensen* rulings that the resources of adjudication can no longer bring relief from the difficulties which the judicial process itself brought into being. Therefore, until Congress sees fit to attempt another comprehensive solution of the problem, this Court can do no more than bring some order out of the remaining judicial chaos as marginal situations come before us. Because it contributes to that end, I join in the Court's opinion.

Theoretic illogic is inevitable so long as the employee in a situation like the present is permitted to recover either under the Federal act (*cf. Parker* v. *Motor Boat Sales*, 314 U. S. 244; *Northern Coal Co.* v. *Strand*, 278 U. S. 142; *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128; *Liability Assurance Co.* v. *Cook*, 281

U. S. 233) or under a state statute (*cf. Millers' Underwriters* v. *Braud*, 270 U. S. 59; *Alaska Packers Asso.* v. *Accident Comm'n*, 276 U. S. 467). That is the practical result, whether it be reached by the Court's path or that apparently left open under the Chief Justice's views. It is scant comfort to an employer that he may find he has committed a misdemeanor in not posting a bond as required by the federal Act because he may have been advised, not unnaturally, that under the prior rulings of this Court the activities of his employees were local in nature and hence he could be sued only under state law.

Mr. Chief Justice STONE.

Any effort to lessen the uncertainties and complexities which have followed in the wake of the *Jensen* decision and its successors during the past twenty-five years deserves sympathetic consideration. But in the present state of the law, the Court's attempt to remove them by construing state workmen's compensation acts and the Longshoremen's and Harbor Workers' Act so that their coverages overlap, can hardly be deemed to be within judicial competence.

Section 3 of the Longshoremen's Act, 33 U. S. C. § 903, authorizes payment of compensation "only . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law". In *Parker* v. *Motor Boat Sales*, 314 U. S. 244, 250, we held, as a matter of construction of this clause of the statute, that it had adopted the rationale of *Jensen* and its followers, regardless of their constitutional validity, as "the measure by which Congress intended to mark the scope of the Act they brought into existence". We thus decided that if by the application of the *Jensen* doctrine recovery could not constitutionally be had under state laws, the federal act conferred a right of recovery whether or not the *Jensen* decision was sound.

The Court's opinion in the present case seems to proceed upon the assumption that if petitioner had filed a claim under the federal act, and the federal commissioner had awarded compensation, we would sustain his ruling, although the Court now holds that the state authorities erroneously concluded they were without

constitutional power to make the award. Indeed, after our decision in *Parker* v. *Motor Boat Sales, supra,* petitioner's right of recovery under the federal act can hardly be doubted: not only could a federal commissioner properly decide in favor of jurisdiction, but any candid application of the *Jensen* rule would seem to compel reversal of a federal commissioner who declined jurisdiction. See *Northern Coal Co.* v. *Strand,* 278 U. S. 142, and *Liability Assurance Co.* v. *Cook,* 281 U. S. 233, both cited to justify the federal award in the *Motor Boat* case, 314 U. S. at 247.

Congress by the enactment of the Longshoremen's and Harbor Workers' Act has left no room for an overlapping dual system of the sort which the Court now espouses by placing its decision on a new doctrine that recovery under either the state or the federal act is to be sustained if the case is thought a close one. Section 5 of the Act, 33 U. S. C. § 905, provides that the employer's liability under it "shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . ." See *Nogueira* v. *N. Y., N. H. & H. R. Co.,* 281 U. S. 128, 137. I cannot say that this section does not mean what it says. If there is liability under the federal act, that liability is exclusive. It follows that in any case in which compensation might have been awarded under the federal act, a recovery under state law is in plain derogation of the terms of the federal statute, as construed in the *Motor Boat* case, *supra.*[1] Congress has made it our duty, before we sanction a recovery under state law, to ascertain that an award under the federal act can not be had.

The proposition that an employee in a "twilight zone" (where it is doubtful whether the federal or a state act applies) can recover under either act, not only controverts the words of the statute but also imposes an unauthorized burden on the employer. Besides being subjected to a liability which the statute forbids, he is compelled, in order to protect himself in the large number of cases in which the Court apparently would allow recovery under either act, to comply with both. Under the federal act, the employer must

[1] The Washington statute explicitly recognizes the exclusiveness of the federal statute, for in its coverage of employees engaged in maritime occupations it is made applicable only to those "for whom no right or obligation exists under the maritime laws". Section 7693a.

post security for compensation in a manner specified in § 32, 33 U. S. C. § 932, and failure to do so is a misdemeanor, § 38, 33 U. S. C. § 938, punishable by fine and imprisonment. Under state acts, there is an obligation to contribute insurance premiums, or take some comparable step, to say nothing of penal sanctions which a state may impose.

Congress has directed that if the case is within the federal statute, the employer shall be relieved of all other obligation. But in order to relieve the employee in a doubtful case of the necessity of filing two claims, one under each act, a double burden is imposed on the employer by an inadmissible construction of the federal act. The dual system of presumptions, which are to operate in favor of the employee but apparently never against him, will serve to sustain an exercise of either state or federal jurisdiction in every case within the so-called "twilight zone". But this is accomplished only by depriving employers of the immunity which Congress sought to confer when it set up a system in which federal and state acts are made mutually exclusive.

Although the basic question in these cases is said to be "factual", the twilight zone doctrine does not reveal how—in view of the great weight which is to be given the federal commissioner's finding, as in the *Motor Boat* case—we can in this case disregard the findings of four state tribunals,[2] or what the function of this Court is to be in cases where the federal and the state commissioners both find against jurisdiction, or how the line which marks the doubtful case is to be drawn more readily than that which, under the *Jensen* doctrine, separates state from federal power.

Notwithstanding the ruling in the *Motor Boat* case that Congress had adopted the *Jensen* boundary of federal jurisdiction, there are in the present case special circumstances which take it out of that ruling and leave us free to reconsider *Jensen's* constitutional basis. The exclusive liability section of the federal statute contains a proviso that if the employer fails to give security for payment of compensation, as required, then the employee may elect to claim compensation under the federal statute, "or to

[2] The state supervisor found that "after thorough investigation it has been determined that the work which the claimant was doing at the time of the said fatal accident does not come under the jurisdiction of the workmen's compensation act, but is maritime in character" and "that the alleged injury was sustained on board a vessel in navigable waters and was therefore under admiralty jurisdiction". His finding and decision were sustained by the joint board of the state department of labor and industries, the state superior court, and the state supreme court.

maintain an action at law or in admiralty". The purpose of this proviso seems to be to preserve to the employee all remedies which he might otherwise have had, in the event that the employer does not give the prescribed security. Since this record does not show that the employer complied, petitioner is free to pursue any available remedy which the Constitution permits and which the state may choose to afford.

Only if the Court were to overrule the *Jensen* case in its constitutional aspects could I join in a reversal of the judgment here. If we are to continue to apply the *Jensen* doctrine, even when not required to do so by the federal act, then our own decisions, including the recent *Motor Boat* case, preclude a reversal of the Washington courts. Escape from *Jensen's* embarrassments by the adoption of the twilight zone doctrine, in disregard of the jurisdictional command of the federal statute, is plainly not permissible. I am not persuaded that it is practicable.

A true copy.

Test:

Clerk, Supreme Court, U. S.